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The Museum of Modern Art and Technical, Office and Professional Union, Local 2110, UAW, AFL-CIO. Cases 2-CA-34355 and 2-CA-34714

August 24, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER
AND KIRSANOW

On December 16, 2004, Administrative Law Judge Steven Davis issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, the Respondent filed an answering brief, and the General Counsel and the Charging Party filed reply briefs. The Respondent filed cross-exceptions and a supporting brief, the General Counsel filed an answering brief (adopted by the Charging Party), and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified below and to dismiss the complaint.

In the course of comprehensively renovating its Manhattan museum facility, the Respondent closed its Film Stills Archive (the FSA) and laid off the FSA's two employees, Mary Corliss and Terry Geesken. Based on Corliss' visible role in a strike 16 months before her layoff, the judge found that the Respondent harbored animus against Corliss, but nonetheless determined that Respondent would have closed the FSA and laid off Corliss and Geesken even in the absence of that activity. Accordingly, the judge recommended dismissing the 8(a)(3) and (1) layoff allegations.

Although we agree with the judge's recommended dismissal of this allegation, we do not adopt his finding of animus. The strike had ended 16 months before the layoffs, there is no evidence that any of the Respondent's managers or supervisors ever voiced a desire to retaliate against the Union or Corliss for the strike, nor is there

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the judge's finding that the Respondent did not violate Sec. 8(a)(3) and (1) by discharging Michael Cinquina.

evidence of disparate treatment of strikers after they returned to work. Thus, although we agree with the judge's conclusion that the layoffs of Corliss and Geesken did not violate Section 8(a)(3) and (1), we do so on the basis that the General Counsel failed to raise an inference that animus against protected activity was a motivating factor in the decision to lay them off. Further, even had the Respondent harbored antiunion animus, we agree with the judge that the link between any such animus and the layoffs 16 months later is too attenuated to support a finding that the layoffs were motivated by anti-union animus.

Also at issue is whether the judge correctly found that the Respondent violated Section 8(a)(3) and (1) by accelerating the layoffs of Corliss and Geesken. Again, there is insufficient evidence that the Respondent's decision to accelerate the layoffs was motivated by animus against Section 7 activity. We therefore reverse the judge and dismiss this allegation.

I. BACKGROUND

A. Overview

The events in the case took place over the course of 2-1/2 years. In 2000, the Museum of Modern Art (MoMA, the Museum, or the Respondent) began a major renovation, called the New Building Project, that entailed closing the museum in Manhattan (MoMA Manhattan) for renovation and expansion. The Museum purchased two buildings in Queens—the Factory and MoMA QNS—to house various collections and departments from MoMA Manhattan in the interim. Upon completion of the New Building Project, the Museum planned to return some collections and departments to MoMA Manhattan and retain others in Queens permanently. The Museum also planned to terminate various leases in Manhattan and to move the art stored at those rental sites to its Queens facilities.

The FSA is one of five subdepartments within the film and media department. Chief Curator Mary Lea Bandy oversees the film and media department. Corliss and Geesken reported to Bandy, but they ran the FSA largely on their own. The FSA is a vast collection of still images related to film from the earliest silent movies onward. It was not open to the general public but was accessible by appointment to individuals having a bona fide purpose for using its resources, including scholars, researchers, writers, and filmmakers. These clients paid the FSA to use images from the collection.

As the New Building Project unfolded, the plans for the FSA changed. The Museum originally planned to move the FSA from MoMA Manhattan to MoMA QNS permanently. Prior to the anticipated move, the Museum

revised that plan and decided to move the FSA to its Film Preservation Center in Hamlin, Pennsylvania. Finally, in 2001, the Museum decided to put its film stills collection in storage in Hamlin and to close the FSA.

B. The Variance Process and the 2000 Strike

The Technical, Office and Professional Union, Local 2110, UAW, AFL–CIO (the Union) represents MoMA’s professional staff. During the planning of the New Building Project, the collective-bargaining agreement between the Museum and the Union expired. In April 2000, negotiations became deadlocked, and the Union called a strike.

As part of the New Building Project, MoMA was required to obtain variances from New York City through a process involving hearings before the Manhattan Borough Board (consisting of city council members from Manhattan) and the City Planning Commission, and culminating in a vote by the full city council. At the Union’s request, City Council Member Christine Quinn opposed the Museum’s variances pending resolution of the strike and lobbied other members to do likewise. In an advisory vote on August 24, 2000, the Manhattan Borough Board rejected MoMA’s variances.

On August 29, MoMA’s director, Glenn Lowry, and two of MoMA’s attorneys met with the Union’s president and the regional director of the UAW and resolved outstanding collective-bargaining issues.

On September 5, 2000, Lowry informed the executive committee of the Museum’s board of trustees that a tentative agreement with the Union had been reached, and the executive committee gave its approval to the agreement.

On September 6, the City Planning Commission held a hearing on the Museum’s variance applications. Mary Corliss spoke at the hearing, urging the Commission to deny the variances pending resolution of the strike. Lowry also spoke at the hearing, urging approval of the requested variances.

On September 9, the Union and the Museum signed a memorandum of agreement, ending the strike. Ultimately, the city council approved the variances. When later questioned by a supervisor as to whether the strike had any bearing on the city council hearing, Katie McDonald, the Museum’s director of government and community relations, told the supervisor and an employee that she thought it did, and that the single most decisive factor in ending the strike was the Union’s ability to threaten the New Building Project.

Both Corliss and Geesken participated in the strike. In addition to testifying before the Planning Commission on September 6, Corliss also was quoted in the media during the strike, including in *Time* magazine, the *Village*

Voice, and the *New York Daily News*. Lowry was aware of Corliss’ union activity during the strike, but he never said anything to her about that activity.

The strikers returned to work after the strike ended. Of those bargaining unit members MoMA promoted after the strike ended, almost half were strikers throughout the strike’s entire duration, while the rest were nonstrikers or strikers who returned to work before the strike ended. Likewise, MoMA laid off roughly equal numbers of strikers and nonstrikers after the strike ended.

After the strike, Corliss and Geesken returned to their regular duties at the FSA until they were laid off 16 months later. During the strike, and up until the time of their layoff, no one in management said anything to them about their strike activities, Corliss’ testimony before the Planning Commission, or Corliss’ articles in the media.

C. The FSA and MoMA QNS

MoMA QNS began a course of extensive renovations to ready it for its role in the New Building Project. In August 2000, the Museum informed the head architect of the MoMA QNS renovation, Scott Newman, that the renovation was running over budget. In response, Newman issued a memo on October 22, 2000, containing 16 cost-cutting proposals. One of his proposals was to cancel plans to construct a new mezzanine level, a portion of which was originally planned to be allocated to the FSA.

Two days later, Architect Newman, Director Lowry, Deputy Director Karen Davidson, and other construction personnel met to go over Newman’s proposals. At that meeting, the proposal to cancel construction of the entire mezzanine was amended to eliminate only the FSA portion of the mezzanine. As suggested by Lowry or Davidson, “To Hamlin” was written next to the FSA on the notes from the October meeting, referring to the Museum’s Film Preservation Center in Hamlin, Pennsylvania, about 100 miles from New York City. As of October 2000, the FSA had been storing part of its collection in the Hamlin Center for 10 years. The Center is a state-of-the-art facility specially designed to preserve film. It has a small staff and is closed to the public.

On December 4, 2000, the Museum’s board of trustees voted to increase the budget for MoMA QNS, making Newman’s proposed cost-cutting measures unnecessary. Thus, the mezzanine level was to be built in its entirety. Nevertheless, the FSA was omitted from a “Draft Relocation Plan” distributed in December 2000. At an all-staff meeting on January 31, 2001, Lowry was asked why the FSA was missing from the relocation plan. He answered that there was no room for the FSA at MoMA QNS, that there would be security problems in housing it there, and that Bandy was considering other locations.

In mid-April 2001, Lowry and Bandy discussed the future of the FSA. Bandy asked Lowry if the Museum could rent space for the FSA in Manhattan. Lowry rejected that option, saying that the Museum could not incur any new storage costs.² Lowry and Bandy then discussed moving the FSA to Hamlin. Bandy told Lowry that operating the FSA from Hamlin would result in additional costs. Lowry reiterated that the Museum could not incur any additional costs. Bandy was also told in a budget meeting in September 2001 that all the departments had to reduce their operating budgets. The budget committee's mandate was "no new expenses."

In March or April 2001, Architect Newman was receiving additional requests from museum officials for space at MoMA QNS. To accommodate these needs, in late April 2001 Newman proposed using the space originally allocated for the FSA. Newman testified that deciding to move any other department besides the FSA out of MoMA QNS would have required renting space. The Museum accepted his proposal, and on April 30, 2001, Lowry confirmed to Bandy the final decision that the FSA would not be relocated to MoMA QNS. A July 2001 revision of the MoMA QNS floor plan showed that the mezzanine space originally allocated for the FSA had been reallocated to visitor services, a project called the "unframing project," and a curatorial study area.

On July 12, 2001, although Bandy told Corliss that the FSA was going to Hamlin, she remained uncertain at that time whether the FSA could operate there. In November 2001, Bandy asked Corliss to prepare a report comparing how the FSA operated at MoMA Manhattan with how it might function in Hamlin. Corliss' report detailed the FSA's space and equipment needs and stressed that many clients would not be willing to travel to Hamlin to access the FSA. This report reinforced Bandy's concern that operating the FSA in Hamlin would not be practical. Nevertheless, in December 2001 Corliss and Bandy traveled to Hamlin to take a closer look.

D. The FSA is Closed and Its Staff Laid Off

Following her December 2001 trip to Hamlin, Bandy told MoMA's human resources director, Oz Zager, that she had decided to close the FSA and lay off the staff. Although she wanted to keep it open, she concluded that operating the FSA from Hamlin was not feasible for several reasons, including the comparative remoteness of the location for users of the FSA's services and the increased costs associated with a Hamlin location, such as for transportation. In sum, Bandy concluded that there was no way to operate the FSA from Hamlin without increas-

ing operating costs, and that the severe budget constraints under which she was operating precluded any additional expenses.

The FSA was not the only department to be closed as a result of the New Building Project. The Architecture & Design Study Center and the Photography Study Center were both temporarily closed during the project, and the writing services department was permanently closed. Similar to the FSA, the Video Study Center was also closed and its collection sent to Hamlin for storage.

In late December 2001, before Bandy's decision to close the FSA was announced, the Union requested to meet with the Museum to discuss the relocation of the FSA, and a meeting was scheduled for January 9, 2002. After speaking with museum counsel, Human Resources Director Zager determined that he was obligated to inform the Union at the meeting that the FSA would be closed and Corliss and Geesken laid off. Although the Museum had intended to lay off Corliss and Geesken on February 22, 2002, the date the FSA was to be closed, once it informed the Union and the two employees of its decision on January 9, the Respondent followed MoMA's normal practice of laying employees off promptly after notifying them of the decision. Thus, Zager and Bandy met with Corliss and Geesken on January 9 to inform them directly about their layoffs, and those layoffs took effect on January 11, 2002.

In February 2002, the New York Observer published an article criticizing MoMA's decision to close the FSA and lay off Corliss and Geesken. Corliss was quoted in the article as criticizing Bandy and the Museum's film and media department. Bandy told Lowry that film and media employees were upset by their department's negative portrayal in the Observer article, and she asked Lowry to call staff members to offer his support. When Lowry suggested that a letter from the film and media department supporting Bandy and "perhaps indicating their lack of respect for [Corliss] may make the strongest case," Bandy replied that she did not favor this approach.

II. THE JUDGE'S DECISION

A. Layoffs

In deciding whether the layoffs of Corliss and Geesken violated Section 8(a)(3), the judge recognized that there were several decisions that led to the layoffs: the decision to remove the FSA from the MoMA QNS plans; the decision to relocate the FSA to Hamlin; and the decision to close the FSA and lay off the staff. The judge addressed each of these decisions in turn.

In addressing the Museum's decision to remove the FSA from MoMA QNS, the judge first found that the Museum bore animus toward the Union for its attempt to

² At this point, the Respondent had decided to reduce its existing lease holdings and not to incur new rental costs.

delay or defeat the New Building Project and toward Corliss for her activities during the strike. This finding was based on evidence indicating that the Union's effort to obstruct the Museum's variance applications was the key reason that the Respondent returned to negotiations with the Union and reached an agreement.³

Because the proposal to remove the FSA from MoMA QNS first arose in the context of keeping the MoMA QNS renovation within budget, and because that budget was increased in December 2000 (removing any immediate financial obstacle to placing the FSA at MoMA QNS), the judge found that Lowry had no legitimate business reason for announcing in January 2001 that there was no room for the FSA at MoMA QNS. He therefore found Lowry's announcement was a pretext. He further found, however, that Architect Newman's April 2001 proposal to use the mezzanine space previously allocated to the FSA to meet other needs was arrived at independently, and was based on legitimate business reasons that justified the adjustment in space. Applying *Wright Line*,⁴ the judge found that, even assuming the General Counsel had sustained his initial burden of showing that protected activity was a motivating factor in deleting the FSA from the plans for MoMA QNS, the Respondent met its rebuttal burden by proving that it would have removed the FSA from MoMA QNS based on Newman's independent April 2001 proposal even absent Corliss' protected activity.

Next, the judge analyzed the Museum's decision to relocate the FSA to Hamlin and its subsequent decision to close the FSA. He found that Corliss and Geesken performed their normal duties without incident for the 16-month period after the strike, that Bandy treated them in a professional manner throughout this period, and that Bandy made a good-faith effort to locate other space for the FSA in Manhattan and, then, to consider operating it from Hamlin.

The judge reasoned that, in order to find the layoffs unlawful, he "would have to find a plan [that] was devised and implemented from the end of the strike in September, 2000 to the layoffs 16 months later which involved personnel from Lowry on down." Moreover, because of the 16-month time gap between Corliss' pro-

ected activity and her layoff, he reasoned that such "latent hostility" would have to be accompanied by a "high degree of antiunion animus" in order to find a violation, citing *Marcus Management*, 292 NLRB 251, 260, 263 (1989). Finding evidence of such animus lacking, the judge concluded that the General Counsel failed to meet his initial burden of proving by a preponderance of the evidence that antiunion animus was a motivating factor in the layoffs. Thus, the judge concluded that the layoffs did not violate Section 8(a)(3) and (1).

B. Acceleration of Layoffs

The judge found that although the layoffs themselves were lawful, the Museum violated Section 8(a)(3) and (1) by accelerating the layoffs of Corliss and Geesken because of the Union's request to meet to discuss the future of the FSA. The judge found that, even assuming it was the Museum's policy to dismiss employees promptly after announcing their layoffs, here, the precipitating reason for accelerating the layoffs was the Union's request for a meeting. Thus, he concluded that the Respondent committed an unfair labor practice by accelerating planned layoffs because of union considerations or because the Union intervened on the employees' behalf.

III. THE PARTIES' EXCEPTIONS

The General Counsel excepts to the judge's conclusion that the layoffs of Corliss and Geesken did not violate Section 8(a)(3) and (1). In support, he relies in part on the judge's findings that Lowry harbored animus toward Corliss for her role in the strike and that Lowry's January 2001 statement that there was no room for the FSA at MoMA QNS was a pretext. The General Counsel also asserts that even if Architect Newman independently proposed removing the FSA from MoMA QNS, the Respondent failed to provide a legitimate rationale for accepting Newman's April 2001 proposal. Further, the General Counsel argues that when Lowry accepted Newman's April 2001 proposal, Lowry simultaneously imposed budgetary restraints that he knew would eventually result in the FSA's closure and the layoffs of Corliss and Geesken. The General Counsel contends that the judge should have concluded that the layoffs were a foregone conclusion as of April 2001. In support, he relies on the facts that Lowry prohibited Bandy from renting space in Manhattan for the FSA and from incurring additional costs, even though Bandy told Lowry the FSA could not operate from Hamlin without increasing costs. The Union's exceptions advance similar arguments.

Based on the above, the General Counsel and the Union argue that the judge should have concluded that the

³ In finding animus, the judge relied on Council Member Quinn's opposition to the variance applications until the strike was settled, the Manhattan Borough Board vote rejecting the applications, the close timing between that vote and the tentative agreement between the Museum and the Union, and the statements made by museum officials Lowry and McDonald regarding the strike's interference with the New Building Project.

⁴ 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983).

layoffs were discriminatorily motivated and thus violated Section 8(a)(3) and (1).

The Respondent excepts to the judge's finding that the Museum bore animus toward the Union and Corliss because of their efforts during the strike. In support of reversing this finding, the Respondent emphasizes that there is no evidence that any manager or agent of the Museum said or did anything suggesting antiunion animus toward any strikers, including Corliss. To the contrary, the Respondent asserts that it welcomed the strikers back to work and that there is no evidence that it treated strikers differently than nonstrikers. Additionally, the Respondent asserts that Lowry was not concerned about the Union's lobbying efforts against the Museum's variance applications. According to the Respondent, the tentative agreement reached with the Union shortly after the Manhattan Borough Board vote denying its variance applications was unrelated to the Union's attempts to interfere with the approval of those applications.

Additionally, the Respondent excepts to the judge's finding that the Museum decided that there was no room for the FSA at MoMA QNS in January 2001. The Respondent argues that Lowry stated that he had space concerns for all the departments slated for MoMA QNS, including the FSA, but that he had not yet made a decision.

The Respondent also excepts to the judge's finding that it violated Section 8(a)(3) and (1) by accelerating the layoffs of Corliss and Geesken. The Museum asserts that it disclosed the impending layoffs because it was legally obligated to do so in response to the Union's inquiries. That Corliss and Geesken were laid off soon after this disclosure was consistent with the Museum's regular practice of implementing layoffs shortly after giving notice, the Respondent asserts. It also asserts that the General Counsel failed to present evidence that antiunion animus was a motivating factor in the acceleration of the layoffs.

IV. ANALYSIS

A. Layoffs of Corliss and Geesken

To prove a violation of Section 8(a)(3) and (1) under our decision in *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected conduct was a motivating factor in the employer's adverse action. Once the General Counsel makes a showing of discriminatory motivation by proving the employee's prounion activity, employer knowledge of the prounion activity, and animus against the employee's protected conduct, the burden of persuasion "shift[s] to

the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct."

Donaldson Bros. Ready Mix, Inc., 341 NLRB 958, 961 (2004) (quoting *Wright Line*, supra; other internal citations omitted).

In affirming the judge's conclusion that the Respondent did not violate Section 8(a)(3) and (1) by laying off employees Mary Corliss and Terry Geesken, we disagree with his finding that the Respondent harbored animus against Corliss for her strike-related activities. Although we reject the Respondent's assertion that the Union's opposition to the Respondent's variance applications played no role in the settlement of the strike, we do not find that the Union's or Corliss' actions in that regard support a finding of animus. When collective bargaining was at a standstill in the summer of 2000, the Union was free to exert bargaining pressure on the Respondent. There is no contention that the pressure exerted here (opposition to the Respondent's request for a variance) was unlawful. Although employers generally do not like bargaining pressure exerted against them (whether the pressure be in the form of a strike or some other form), the Board does not infer antiunion animus from such dislike. Thus, without more, the Union's lobbying against the Museum's variance applications, and Corliss' role in that lobbying, are insufficient to support a finding of animus.⁵ And, indeed, there is nothing more. There is no evidence that Lowry or other managers ever expressed bitterness or resentment toward Corliss or any other strikers about the Union's strategy to lobby city council, let alone an intent to retaliate.⁶ After the strike ended, MoMA promoted and laid off roughly equal numbers of strikers and nonstrikers, and Corliss and Geesken returned to their normal duties without incident. On this record, there is simply insufficient evidence to support a finding of antiunion animus.

⁵ We observe that, in reaching an agreement, the Museum agreed to the Union's proposed union-security clause, and the Union waived its right to arbitrate or strike over changes the Museum might make in health benefits. Thus, both parties compromised to reach agreement.

⁶ As stated above, after the 2002 closure of FSA, when Bandy told Lowry that film and media department employees were upset about an Observer article in which Corliss was quoted as criticizing Bandy and the department, Lowry advised that the department write that publication to express support for Bandy and "perhaps . . . lack of respect" for Corliss. The record contains no further explanation of this "lack of respect" remark, and we can attach no significance to it. Under the circumstances, however, we think it far more likely to have been prompted by Corliss' criticisms in the Observer article than by her strike-related activities 1-1/2 years earlier.

We also disagree with the judge's finding that Lowry's January 2001 announcement that there was no room at MoMA QNS for the FSA was pretextual. The judge based this finding, in part, on the Respondent's animus, which finding we have rejected, above. Further, although the MoMA QNS renovation budget had been increased before Lowry's statement, Lowry did not announce that there was not enough *money* to move the FSA to MoMA QNS; he announced that there was not enough *space* for the FSA at MoMA QNS.

Even with the eventual addition of a full mezzanine floor at MoMA QNS, the Museum did not have enough space to maintain all of its functions during the New Building Project. The FSA was not the only department to cease operating in this period of upheaval. As stated above, the Architecture & Design Study Center and the Photography Study Center were closed for the duration of the project, the writing services department was permanently closed, and the Video Study Center was closed and its collection sent to Hamlin for storage. In addition, the Respondent changed its plans often during the New Building Project, sometimes changing the function for a particular location without immediately planning for the subsequent effects of the change.⁷

Significantly, MoMA QNS Architect Newman testified that removing any department from MoMA QNS other than the FSA would have required renting new space for that department. This would have run counter to the Respondent's plan to end its leases, and reduce expenditures, in favor of using museum-owned facilities. The Center in Hamlin was just such a museum-owned facility. It was specially designed for the storage of film and photographs, and part of the FSA collection was already in storage there. So even though the MoMA QNS budget was increased, the Museum's decision to remove the FSA from MoMA QNS with Hamlin in mind as its ultimate location was reasonable, and thus we do not consider it to be a pretext for antiunion discrimination.

The subsequent decision to close the FSA and lay off Corliss and Geesken was reached in good faith by Bandy. Bandy considered several options and consulted Corliss by asking her to write a report on how the FSA might function from Hamlin and by inviting her to accompany Bandy to Hamlin. We are not persuaded by the General Counsel's argument that Lowry plotted to place

financial restraints on Bandy so that she was left with no choice but to close the FSA. In fact, the budget committee told all department heads to reduce their operating budgets, not just Bandy.

In sum, we find that the link between the layoffs—16 months after the strike ended—and Corliss' strike-related activities is too attenuated to support a finding that the General Counsel sustained his initial *Wright Line* burden. There was insufficient evidence of antiunion animus even at the time of Corliss' protected activities, and this was followed by over a year of Corliss and Geesken working at the FSA without incident. In any event, the evidence fails to establish that animus was a motivating factor in the subsequent layoffs. We therefore conclude that the Respondent did not violate Section 8(a)(3) and (1) by laying off Corliss and Geesken.

B. Acceleration of Layoffs

The judge found that the Respondent violated Section 8(a)(1) and (3) by accelerating the layoffs of Corliss and Geesken as a result of the Union's request to meet concerning the future of the FSA. For the following reasons, we disagree.

The record simply does not support the judge's finding that the decision to accelerate the layoff date was motivated by antiunion animus. The record shows that the Museum had already made a decision to close the FSA and lay off its staff when the Union inquired about the status of the FSA in late December 2001. There is no dispute that, at the January 9, 2002 meeting that followed, the Respondent's duty to bargain in good faith obligated it to be truthful with the Union and disclose its plans. Once the Union had been told of the planned layoffs, it became necessary to tell Corliss and Geesken as well, since they would have heard the news from the Union had the Museum not told them directly.⁸ The Museum presented evidence establishing that in moving up the date of the layoffs, it was adhering to its regular business practice of dismissing employees soon after they are informed of their impending layoffs. The acknowledged purpose of the policy is to avoid the adverse impact the employees' continued presence may have on general employee morale. There is no evidence that Corliss or Geesken were laid off earlier than planned because they sought the Union's assistance or engaged in any other protected activity. In fact, there is no evidence whatsoever of retaliatory motivation of any kind.

⁷ When asked for examples of such changes, Museum Project Director William Maloney testified that the Museum decided to expand the café in MoMA Manhattan, occupying office space without any provision for where those offices would be relocated. He also stated that the Education Center displaced two curatorial departments that in turn displaced the retail group, and the new location for the retail group had yet to be decided.

⁸ In fact, the Union did tell Corliss and Geesken about the layoffs immediately before the Respondent met with them.

For these reasons, the judge's finding that the Respondent unlawfully accelerated the layoffs of Corliss and Geesken lacks support in the record and must be reversed.

Inasmuch as we have found that the Respondent did not violate the Act, we shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 24, 2006

Robert J. Battista,	Chairman
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Peter C. Schaumber,	Member
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Peter N. Kirsanow,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

Jamie Rucker and Geoffrey E. Dunham, Esqs., for the General Counsel.

Peter D. Conrad and Michael J. Lebowich, Esqs. (Proskauer Rose LLP), of New York, New York, for the Respondent.

Allyson L. Belovin and Daniel Engelstein, Esqs. (Levy, Ratner, P.C.), of New York, New York, for the Union.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge and a first amended charge filed in Case 2-CA-34335 on February 4, and November 27, 2002, respectively, by Technical, Office and Professional Union, Local 2110, UAW, AFL-CIO (Union), and based on a charge and a first amended charge in Case 2-CA-34714, filed on June 28, 2002, and January 27, 2003, respectively, by the Union, a consolidated complaint was issued on April 1, 2003 against the The Museum of Modern Art (Respondent, Museum or MoMA).

The complaint alleges essentially that on about January 11, 2002, the Respondent discharged its employees Mary Corliss and Terry Geesken, and that on about June 5, 2002, it discharged employee Michael Cinquina. The complaint alleges that these employees were discharged because of their support for the Union and because they engaged in activities in behalf of the Union, and other protected concerted activities. In this regard, the complaint also alleges that the Union, including its members, Corliss, Geesken and Cinquina, engaged in a strike against the Respondent from about April 28, 2000 through about September 9, 2000.

The Respondent's answer denied the material allegations of the complaint, and asserted that the three named employees were laid off and not discharged, and that they continue in that

status. On 23 days from September, 2003 to January, 2004, a hearing was held before me in New York, New York.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New York not-for-profit corporation, with offices and places of business located at 11 West 53rd Street, New York, NY, at 33rd Street and Queens Boulevard, Long Island City, Queens, NY, and at Hamlin, Pennsylvania, has been engaged in the operation of a museum and the provision of related cultural services to the public. Annually, the Respondent derives gross revenues from its operations in excess of \$1,000,000, and purchases and receives at its facilities, goods and materials valued in excess of \$5,000 directly from suppliers located outside New York State. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background and contentions

This case has as its background the enormous renovation of the Respondent's 53rd Street Manhattan facility, the foremost museum of modern art and design in the country. The renovation involved the demolition of the entire structure, the acquisition, demolition and inclusion of adjacent properties into the project, the construction of a new, much larger facility, and the purchase and redesign of a warehouse/exhibition facility in Long Island City, New York.

The cost and scope of the renovation were immense. The new 53rd Street facility would be expanded from about 380,000 to about 680,000 square feet, and the total budgeted cost for the entire project was about \$860 million. In order to accomplish this ambitious construction project on 53rd Street, the Respondent filed applications for various building and zoning variances, and participated in hearings on the applications, which were voted on by various New York City government offices.

In anticipation of the close of the museum due to its renovation, employees were laid off and its in-house bookstore was closed.

The foreground of this case is a four-month strike over a renewal collective-bargaining agreement. More than half of the unit's 224 employees engaged in the strike, and remained on strike throughout its duration.¹ Strikers testified at one of the New York City building variance hearings, engaged in daily picketing, including picketing at public Museum events, and the picketing included the maintenance of a large, inflated rat in front of the Museum. Foremost among the strikers who en-

¹ One hundred twenty of the 224 unit employees went on strike and remained on strike.

gaged in public activities were Corliss and Cinquina. Both gave testimony at the City Planning Commission hearing, urging the New York City Council members to reject the Museum's application for variances until the strike was settled, and both were interviewed in the media concerning the strike. In addition, Corliss spoke with Council member Christine Quinn who vigorously lobbied her colleagues to reject the requested variances until the strike was settled. Cinquina, who held a high position in the Union, was the employee leader of the strike and the picketing.

Counsel for the General Counsel argues that long-term employee Corliss, her assistant Geesken, and Cinquina were discharged because of their strike activities, as set forth above. He asserts that the Museum harbored animus toward Corliss and Cinquina, essentially because their actions (a) threatened to delay or interfere with the Museum's expansion plans and (b) caused the Museum to agree to the Union's contract terms in settlement of the strike. It is further alleged that the Respondent utilized and manipulated its renovation plans as a "cover" to ultimately discharge them and Geesken.

The Respondent argues that all three employees were not discharged, but rather were laid off. The Museum first asserts that it had no reason to believe that Corliss' Union activities could threaten its renovation project. It further contends that such activities, having taken place 16 months years prior to her layoff, had nothing to do with its business decisions to, first, remove her department from the Queens building to which it was originally assigned, and then to move the department to Pennsylvania, and finally to lay her off when the department was closed. According to the Respondent, Cinquina was laid off essentially due to the implementation of an automated book-ordering system, and because the bookstore in which he worked was closed during the renovation.

2. The land use proceeding and the strike

a. The land use proceeding

As part of its 53rd Street building project, the Museum filed various applications for variances from New York City zoning regulations. The applications are considered in a proceeding called the Uniform Land Use Review Process (ULURP). The process included a hearing before the Manhattan Borough Board, which is comprised of New York City Council members from the borough of Manhattan, a hearing before the City Planning Commission, and ultimately a vote by the City Council. Museum director Glenn Lowry testified that if the variance approvals were not granted, a "good portion" of the building would have to be redesigned, at considerable cost.

The ULURP process began in early 1999 with the filing of the applications. Christine Quinn, the City Council member whose district included the Museum, was informed in about early March, 2000 by Lowry and Katy McDonald, the Museum's director of government and community relations, about the upcoming renovations and applications. She expressed unqualified support for the project. However, immediately thereafter, she was advised by the Union that collective-bargaining negotiations for a renewal contract were not going well.

Quinn testified that one or two weeks before the strike began in April, 2000, she met with Lowry and McDonald, and asked

that the dispute be settled, as soon as possible, "to the satisfaction of the Union." In early May, when the strike was one month old, Quinn sent a letter to Lowry, signed by a number of City Council members, urging a renewed effort to reach agreement on a new contract. At about the same time, Lowry and McDonald met with Quinn and members of the New York City Assembly. The politicians urged an end to the strike. Quinn announced that she could not support the expansion project and the zoning variance as long as the strike continued, and that she "would do everything within the power of my office to make sure that the variance was defeated as long as the strike continued." Lowry objected to her approach, and responded that it was "inappropriate" to connect the two matters - the strike and the ULURP proceeding. In the next four months, Quinn had about two similar conversations with Lowry and McDonald.

In mid May, Quinn told Lowry that she would be "lobbying" her colleagues to vote against the variances requested by the Museum, and Lowry again told her that the "linkage" between the two matters was inappropriate. Quinn stated that she told Lowry and McDonald that her lobbying activities were "going well." Quinn believes that she told Lowry that she was urging her colleagues to vote "no" at the upcoming Manhattan Borough Board hearing.

Quinn testified that on August 23, one day before the Manhattan Borough Board hearing, a meeting was held with Manhattan City Council representatives, Museum officials including Lowry, Union representatives, and certain residential neighbors of the Museum who objected to the larger new building's expected interference with their homes. Lowry spoke about the variance and the labor negotiations, and continued to oppose any linkage between the strike and the ULURP proceeding.

The following day, the Manhattan Borough Board held a hearing, at which Quinn spoke against approving the variances sought by the Museum. Lowry and William Maloney, the Museum's building project director spoke in behalf of the Museum. Certain of the Museum's neighbors also spoke. The vote was two votes in favor of approval, four against, and five abstentions. Inasmuch as there was no majority in favor of approving the variances, they were rejected. The vote was advisory only, and not binding. Quinn stated that after the vote, she lobbied against approval of the variances with the chairs of the land use committee and zoning subcommittee, but she did not share her views with the City Planning Commission.

On August 29, five days after the Manhattan Borough Board vote, a contract negotiation session took place among the top officials of the parties at which agreement on the major terms of a new agreement was reached. On September 5, the Museum's trustees' executive committee gave its approval to the expected settlement.

The following day, September 6, a City Planning Commission hearing was held to consider the Museum's application. A number of people made presentations including Lowry, Union president Maida Rosenstein, and Corliss. Corliss accused the Museum of paying "little attention" to its staff by paying them little, refusing to negotiate with the Union, "disregard[ing]" the fundamental rights of collective bargaining by insisting that the workers waive their right to negotiate medical benefits, and "willfully misrepresent[ing] the facts at issue." Corliss stated

that “until MoMA treats its staff with fairness and respect, I find it hard to trust the promises it makes before the City Council or the City Planning Commission.”

Maloney testified that as of September 6, the Museum was “very confident” that its applications would be approved by the City Planning Commission. The Museum’s only concerns at that time were its neighbors on 54th Street and at 600 Fifth Avenue, who threatened lawsuits which could have held up the approval process.

On September 9, a full agreement was reached on the terms of a renewal collective-bargaining agreement and the strike ended. Immediately thereafter, Quinn notified the Museum that she no longer had any objection to the Museum’s ULURP application. Thereafter, the City Planning Commission and the City Council approved the Museum’s applications.

b. The strike, the negotiations, and the land-use proceeding

The Union, or its predecessor, has represented the professional staff at the Museum for at least 30 years.² Until the current agreement, the Respondent has been an open shop. About 20 years ago, the Union began proposing, in negotiations for a new agreement, that a union security clause be included in the collective-bargaining contract. The Respondent refused to agree to such a clause since its staff had agreed years before that union membership should be the choice of the individual.³

The contract was due to expire on October 31, 1999, and negotiations began in the late summer of 1999. On about September 8, 1999, the Union presented its proposals, including an agency shop, in which it was proposed that “employees hired after the ratification of the contract pay dues or agency fees as a condition of employment.” That proposal was rejected by the Museum until the August 29 settlement of the contract.

The General Counsel argues that the union security issue was of major concern to the Respondent, and therefore the Museum’s ultimate acceptance of the agency shop clause, as originally demanded by the Union, demonstrates that the Union “won” the strike. The General Counsel argues from this that the Respondent was embittered by the Union’s “victory,” and sought to punish the people it believed were responsible, Corliss, Geesken and Cinquina.

The employees represented by the Union had, for many years, participated in the Museum’s health and welfare program which covers employees represented by other unions, non-union workers, and management personnel.

L. Robert Batterman, the Respondent’s counsel who negotiated the current contract, testified that early in the negotiations, in 1999, he understood that the Union believed that it had a right to bargain over changes that the Museum made to the health and welfare program. Batterman believed that the Museum had an understanding with the Union that the Union had waived its right to bargain over such changes because of its participation in the Museum’s plan. However, in these negotia-

tions, the Union insisted that it had not waived its right to bargain about such changes.

In February, 2000, the Respondent, as one of its new proposals, demanded that the Union “continue to waive its right to bargain over other terms and conditions of health coverage, provided that union staff always receive benefits identical to those offered to non-union members of staff.” Batterman believed that this was a major issue because the Museum required the flexibility to change its plan due to “exploding” costs. Batterman testified that in June, 2000, he believed that the major stumbling block to reaching agreement was that the Union was unwilling to compromise on the Museum’s demand that it waive its right to bargain on changes in the health plan.

Batterman advised the Museum that the waiver issue must be resolved in its favor through collective-bargaining. Batterman and Lowry did not believe, however, that the agency shop clause demanded by the Union was of major concern, but when the waiver issue was presented by the Union, management decided to “stand firm” on the agency shop clause demand as a “trade” for the important waiver language it sought.

The health care provision ultimately agreed to requires the Museum, prior to making any changes in its health and welfare program, to negotiate in good faith with the Union over its proposed changes. In the absence of agreement over such changes, the Museum retains the right to implement such changes, and the Union waives its right to strike or arbitrate over such changes or the implementation thereof.

Batterman testified that once the Union was prepared to drop its demand for union security and agree to “grandfather” existing employees, he knew that the key issue of the Union’s waiver of bargaining over health benefits would be resolved. However, the Union’s proposal, from the start, was identical to what the Museum agreed to following the lengthy strike—that only workers hired after the contract’s ratification be required to pay dues or agency fees. Accordingly, nothing prevented the Museum from agreeing, from the beginning of the strike, to the Union’s proposal. However, according to Batterman, he rejected the Union’s demand in order to make it appear that it was more important than it really was—in keeping with this, he told the news media that if the Museum agreed to an agency shop clause, the strike would be settled.

According to Batterman, at a point when he believed that the Union had been weakened, he thought the time was ripe to settle the strike, but did not know how to do so.⁴ In about mid August, 2000, he contacted Bruce Raynor, the international president of UNITE, in order to act as a mediator to encourage the parties to settle.

As set forth above, on August 24, the Manhattan Borough Board voted to reject the Museum’s applications for variances.

On August 29, a meeting was held with Lowry, Batterman, the Museum’s general counsel Patty Lipshutz, Union president Rosenstein, Raynor, and Philip Wheeler, the regional director of the United Auto Workers, who was Rosenstein’s superior. This was an off-the-record meeting that the negotiating committees were not aware of. A long meeting took place, ending

² In addition to the Union, four other labor organizations have collective-bargaining agreements with the Museum, pursuant to which they represent various employees.

³ Each of the Museum’s contracts with the other unions contains a union security clause.

⁴ Batterman believed that less than half the unit was striking, but, in fact 53% of the unit employees struck and remained on strike.

in agreement on the major issues of health benefits and agency shop. Specifically, the Museum agreed to an agency shop clause for all new employees, and also agreed that the Union had a right to bargain over the Museum's changes to the health plan, and the Union waived its right to strike or arbitrate over such changes. A formal meeting was arranged for September 8.

On September 5, the Museum's board of trustees executive committee met. In attendance, in addition to the executive committee, were Lowry and Batterman. According to Batterman, he discussed with Lowry the "politics of the presentation" Lowry would make, including the reason why agreement was reached at this time. The committee was told the importance of the health benefits issue, and the relative unimportance of the agency shop agreement that had been made. Lowry also said that he would get the board's "attention" if he mentioned the strike's impact on the building project.

The minutes of the meeting, taken by Lipshutz, included the following:

Mr. Lowry explored the possible long-term effects of continuing the strike while emphasizing that, to date, these effects had been minimal with regard to the Museum's operations. He asserted that if the strike continues, in all probability, it would impact the New Building Project and the approval processes required in conjunction with the Project.

....

During the discussion [the negotiation session of August 29] it became clear that the UAW would continue its strike indefinitely unless it obtained agreement from the Museum to an agency shop. The Museum made clear its position on the health care plan.

Batterman testified that Lowry's reported comment that the strike would impact the building project was a "little puffing" by Lowry, which was directly contrary to what Lowry had been telling him, even in the prior week, that the strike had no impact on the project or the ULURP proceeding. Indeed, Batterman stated that if the minutes reflected that Lowry said that the strike "could" impact the building project and the approval process, that would be a truthful statement. Lowry's testimony was similar. He said that he would have emphasized that if the strike continued "at any length" it could have an impact on the Museum's ability to get the project finished. However, Lowry further testified that, as of the date of the executive committee meeting, the strike had "no impact whatsoever" on the building project. Lowry sought to give the board "every reason under the sun . . . even some very remote reasons" to support the settlement which had been reached.⁵

Lowry told Batterman repeatedly that he was not concerned about the ULURP proceeding. Indeed, that it was a "done deal," the "politics would play out," that the politicians would go through a "song and dance and raise as much of a stink as possible," but ultimately, the Museum would get the necessary

approvals. Batterman also stated that Lowry told him not to be concerned about problems that might arise—little "firefights" with the Museum's neighbors on 54th Street, or the Union "reaching" the Manhattan Borough Board—because the City of New York would not stop the Museum's progress in proceeding with a \$600 million expansion of the world's premier modern art museum, simply because of an economic strike by its union.

On September 6, one day after the Museum's executive committee meeting, the City Planning Commission held a hearing on the Museum's applications at which Corliss and Cinquina spoke. The Union and the Museum met three days later, on September 9, at which other outstanding issues were resolved and the parties signed a memorandum of agreement. Lowry denied that the September 9 settlement with the Union was related in any way to the City Planning Commission hearing held three days earlier.

Anna Hammond, a supervisor and the director of the department of writing services, testified that in the Fall of 2000, after the strike ended, she had a conversation with Joe Hannan, an editor in that department, and McDonald, the Museum's director of government and community relations. They discussed the reasons for the conclusion of the strike. McDonald said "well, it got in the way of the building project." Hammond asked if the strike had anything to do with the City Council hearing in early September. McDonald answered "yes. I think that that was probably a real turning factor for the strike." Hannan testified that McDonald said that "the single most decisive factor in the conclusion of the strike was the ability of the Union and the strikers to threaten the building project."

McDonald denied the comments attributed to her. She denied speaking with Museum management following the end of the strike as to the basis of the settlement. She affirmatively stated that the strike did not get in the way of the building project, and the ULURP process continued on schedule. However, she conceded telling Hammond and Hannan that she was aware that the Union had "linked" the ULURP proceeding with the negotiations as a "strategy" in which it used ULURP to apply "leverage," through public testimony, on the Museum. I cannot credit McDonald's denial of her conversations with Hammond and Hannan. As the director of government and community relations, it would be expected that she would be intimately familiar with the ramifications of the ULURP proceeding and the effect of the strike on that proceeding. I similarly cannot credit her testimony that she did not speak with Quinn during the strike. Quinn and her assistant Maura Keaney gave detailed testimony about their meetings with Lowry and McDonald. Lowry conceded speaking with City Council members, and did not deny that he spoke with Quinn.

The Respondent asks me to find that it was confident in the success of the ULURP proceeding, and that Lowry believed that the strike had no effect on the building project. The evidence is to the contrary. Lowry admitted telling the Museum's trustees' executive committee that the continuation of the strike "would" or "could" affect those proceedings, and McDonald, its director of government and community relations, who was involved in the ULURP matter, told Museum supervisor Hammond and her assistant Hannan that the City Council hear-

⁵ Lowry had been told by one of the Museum's trustees that the Teamsters union had advised the investment firm Goldman Sachs & Co. that it was reviewing its investments with the firm in light of the strike. Apparently, Goldman Sachs was the underwriter for certain Museum bonds. Cinquina engaged in informational picketing at that institution.

ing was probably a real turning factor in the strike, and the single most decisive factor in the conclusion of the strike was the ability of the Union and the strikers to threaten the building project. I accordingly find that Lowry was concerned and had reason to be concerned that the strike would have an effect on the ULURP proceeding.

c. The strike activities of Corliss and Geesken

Lowry testified that the vote of the Manhattan Borough Board denying approval of the Museum's applications for variances was nonbinding and "inconsequential," and which he believed would have no impact on the Museum's ability to get its zoning variances approved. He was assured of that fact by members of the City Council, members of the City Planning Commission, and the Museum's own advisors. Ultimately, of course, the City Council approved the Museum's applications. Lowry's understanding was that the City Council and the City Planning Commission would make their decisions based on very objective criteria, and that the Museum had an "extremely compelling" case, which had received much preliminary support from the members of those two bodies who were strong supporters of the project. Specifically, Lowry spoke to the chairman of the City Planning Council, and the council member who was chair of the subcommittee on land use, and other City Council members. He was assured by all of them that the City of New York was "completely behind" the Museum's application, and that it could expect such approval in due course. In those discussions, the matter of the vote of the Manhattan Borough Board was not a topic, but earlier in the process he was told that the vote of such body was inconsequential. Lowry said that the Museum was "focused" only on the City Planning Commission, and the City Council vote.

Lowry spoke at a hearing before the City Planning Commission on September 6. He saw Corliss at that hearing, but did not hear her speak. He became aware, thereafter, that Corliss had spoken against the variance at that hearing. He testified that he did not resent the staff for striking, or hold it against anyone after the strike, because they had a right to do so.

Lowry did not believe that the strike damaged the Museum, but conceded that it "was not a good thing either." The Museum remained open during the strike, but several programs were cancelled, such as the twice-weekly summertime performance of Julliard School students who refused to cross the picket line, a benefit concert featuring Sheryl Crow who refused to cross the picket line, and the summer film series. Cinquina estimated that about 10% of the visitors did not patronize the Museum because of the strike. Building project manager Maloney testified that the strike and the picketing did not interrupt any demolition work or construction work.

Corliss' strike activities which were a matter of public record included her testimony at the City Planning Commission, set forth above, and quotations of her comments regarding the strike which were reported in the media, and articles in Time magazine on August 14, 2000 which Lowry read, the Village Voice dated June 13, 2000, and her comment in the August 25, 2000 New York Daily News which stated that "the borough board's action could pressure museum management to resolve the labor dispute before the full Council takes up the zoning

issue in about two months." Geesken was a picket captain during the strike.

Following the end of the strike, Corliss and Geesken returned to their regular duties in the Film Stills Archive (FSA) and continued work there until their layoffs 16 months later. During the strike and during their return to work, no one in management said anything to them about their strike activities, Corliss' testimony at the City Planning Commission hearing, or the articles in the media.

3. The film stills archive

a. The collection

The Museum is comprised of seven curatorial divisions, one of which is the Film and Media Department whose chief curator is Mary Lea Bandy. The Film and Media Department includes five sub departments: film stills archive, exhibition, archive, film study center, and the circulating film and library. The primary collection of the Film and Media Department is its original films, consisting of some 22,000 films from the 1890's to the present.

The Film Stills Archive (FSA) is essentially a collection of visual images and other items relating to films from the earliest silent movies and onward, still photographs of films being made, portrait photos of film stars, and photographs of filmmakers. The collection is vast, comprising about four million black and white photo prints, 500,000 slides, and 200,000 negatives contained in about 145 file cabinets. There are also about 70 to 100 boxes of materials obtained over the years that have not been filed.

The FSA employed two individuals, Corliss, who joined the Museum's Film Department in 1967, and then transferred to the FSA as an archivist. She began as a curatorial assistant, and then became assistant curator, a position she has held since 1985. Her assistant, Geesken, is a cataloger, having been employed in the FSA since 1983.

The collection is used by scholars, teachers, academics, film makers, photo editors, art directors, newspapers, magazines, researchers and writers, for research and as illustrations in their publications. MoMA staff also had access to, and used the FSA for its publications. The archive is not open to the public as a gallery would be. Rather, individuals having a bona fide purpose in using its resources make appointments with Corliss and Geesken. Corliss estimated that about 1000 individuals visit the FSA each year, and an equal number of people utilize the FSA through e-mail and fax orders.

In a MoMA publication, Bandy was quoted as saying that "our colleagues doing research in film history and just about every other writer on film depend on our still photographic archive, one of the richest and most comprehensive of its kind." The Museum has referred to the FSA as "world-renowned."

Corliss and Geesken select the stills sought by the user, during an in-person visit they monitor the user's examination of the stills, and take orders for copies, which are sent to a lab outside the Museum. They send the copies to the user, and issue invoices and receive payments for the copies. They also maintain the collection by examining the stills for evidence of damage or fading, and when new stills are received, catalog and file

them. Corliss has also designed and installed 41 exhibitions at the Museum.

b. The renovation of the Museum and its affect on the FSA

1. The placement and subsequent removal of the FSA

Glenn Lowry, the director of the Museum, was hired in 1995. The renovation of MoMA had been discussed even before his hire, but shortly after his employment the project began in earnest. By 1996, an architect was retained, and it was apparent that the Museum would be demolished and totally renovated. Accordingly, two main activities were called for at that time: a determination as to where the collections then housed in the Museum would be placed during the renovation, and a study of how much space was needed for the Museum's departments in that new space.

In August, 1999, the Respondent purchased the Swingline Staple factory in Long Island City, Queens, a 160,000 square foot building. The facility, later named MoMA QNS, was obtained for the initial purpose of storage and research, with the staffs of the relocated departments working there.⁶ The FSA, both the collection and its two-person staff, was included in the early plans for MoMA QNS, and was scheduled to be installed on the mezzanine of that building. Unlike certain other departments and staff, which were expected to return to the 53rd Street location of the Museum upon its renovation, the FSA and its staff were to remain at MoMA QNS.

In the last half of 1999, it was decided that with the closing of the Museum for at least two years, MoMA should continue to have a cultural presence in New York, and that MoMA QNS should be utilized to present exhibitions as well as store the various collections.

There was no immediate affect upon FSA of the decision to mount exhibitions at MoMA QNS, and in fact, on September 29, 1999, the architect, Scott Newman, prepared a sketch of the proposed FSA layout, which included about 1900 square feet on the mezzanine of MoMA QNS. On January 10, 2000, Newman had begun identifying and incorporating the Museum's needs for exhibition space into his design for MoMA QNS. On March 8, 2000, he identified Visitor Services as an area requiring space at MoMA QNS. By April 26, 2000, Newman was attempting to finalize the layout for the FSA.

Newman was scheduled to meet with Corliss on April 28 to review final plans for the FSA at MoMA QNS. However, on that day the strike began, and the meeting did not take place. During the strike, on July 27, Bandy approved a floor plan for MoMA QNS, which included space for the FSA. Bandy testified that she regarded the FSA as a "photo service" and that all photo services of the Film and Media Department, including the digital imaging area, and the archive of the history of MoMA which includes photographs, should be kept together in MoMA QNS. She believed that MoMA QNS could be a recognized research facility, to which users could visit and easily perform research. Lowry told Bandy that any area that needed

to be housed in its entirety, such as the FSA, would go to MoMA QNS.

The General Counsel argues that Corliss' strike activities were a motivating factor in the Museum's actions, made after the strike ended, to (a) decide not to locate the FSA at MoMA QNS (b) move the FSA to Hamlin, Pennsylvania and (c) close the FSA and lay off Corliss and Geesken.

In analyzing the General Counsel's contentions, it is important to identify the sequence of events that occurred regarding the renovation and the intended use of MoMA QNS, during and after the strike, which ran from April 28 through September 9, 2000.

In an August 22, 2000 memo, the Museum's construction department noted that the MoMA QNS' budget of \$15 million had been increased to \$22 million due to the addition of the mezzanine. Architect Newman testified that when he received that memo, he became aware that Lowry had placed a "hold" on the MoMA QNS project by reevaluating the plans. Newman was asked to propose measures to bring the project within budget, and in late September, he began work on a proposal.

The strike ended in early September, 2000, and one month later Corliss asked Karen Davidson, the Respondent's deputy director of policy, planning and administrator and the Museum's prime liaison to the building project, to bring her up to date regarding any changes to the FSA floor plan. Davidson replied on October 9, that she would see if she could arrange another appointment with Newman to review the plans. On October 13, Davidson told Corliss that she spoke with Newman, and that during the summer several meetings took place concerning "departmental layouts" for the MoMA QNS building and another building in Long Island City, and that "subsequently, construction issues on 53rd Street as well as budget issues for MoMA QNS have caused Glenn [Lowry] to re-visit all plans for spaces and locations. He will assemble a team to address these. So for now, everything is on hold." Clearly, these references to a "hold" related to the budgetary concerns for the continuation of the MoMA QNS project, and not, as the General Counsel argues, to the strike activities of Corliss and Geesken.

On October 22, Newman issued a memo containing 16 proposals to reduce the estimated construction cost of MoMA QNS by \$5 million. They included the deletion of the mezzanine where the FSA was scheduled to be installed, and a recommendation that space outside the Museum's properties be leased for the FSA. It was further noted that a deletion of the mezzanine would require that space be leased for collection storage and for the Paper Conservation lab. It is clear that focusing on the removal of the mezzanine was considered as a way to reduce the budgetary increase resulting from its installation, as set forth in the August 22 memo. Accordingly, I find no improper motive in the attention given to the mezzanine inasmuch as the August 22 memo was generated before the Manhattan Borough Board hearing and Corliss' later remarks at the City Planning Commission.

Newman said that he did not discuss any of the proposals with MoMA's personnel before he wrote the memo. He made these proposals in the hope that none would be approved since their elimination would reduce the functionality of the facility.

⁶ The move to MoMA QNS of artwork and staff took place between March and August, 2002.

Indeed, it appears that their very proposal invited their rejection, as follows: (a) delete new elevator which would require larger art works to be transported outside when moved between floors (b) delete sprinkler system and reduce security systems (c) reduce the size of air conditioning which would cause the building to be hot on hot days. Newman estimated that many of the changes would result in a delay in the construction start date, amounting to a loss of \$200,000 per month.

Two days later, on October 24, a meeting was held at which Lowry, Davidson and construction personnel were present. It was agreed that only four of the sixteen proposals would be studied by the design team with the MoMA staff before final decisions were made. One of the proposals was to delete a portion of the mezzanine, and relocate the FSA to the Museum's state of the art Film Preservation Center in Hamlin, Pennsylvania. Newman testified that during those discussions, there was no mention of the strike or anyone's participation therein. Lowry testified that during that discussion, when the participants considered where the FSA could go if the mezzanine was eliminated, Hamlin was discussed. Either Lowry or Davidson mentioned Hamlin as a possible destination for the FSA. Hamlin is located 100 miles, and a two hour drive from Manhattan.

The General Counsel notes that this revised proposal concerning the mezzanine and the FSA differed markedly from Newman's earlier proposal. Whereas, the original proposal required the deletion of the entire mezzanine and the consequent loss of space for three areas, the revised proposal recommended a deletion of only that space slated for the FSA. It must be pointed out, however, that collection storage would also be moved off the mezzanine and stored in the space allocated for the Study Center and Conference Room. Maloney, the Museum's building project director, stated that greater savings would be achieved if the entire mezzanine was deleted as opposed to only a part of it.

With respect to these proposals, it must be emphasized that Newman, without input from Museum personnel, made the initial proposal to delete the entire mezzanine.

On December 4, 2000, the Museum's Board of Trustees voted to increase the budget for MoMA QNS, thereby making it unnecessary to implement any of the four proposals, except for a rooftop revision. Accordingly, at that time the FSA was scheduled to be installed on the mezzanine at MoMA QNS as originally planned.

Nevertheless, in a "Draft Relocation Plan" distributed in December, 2000, the FSA was the only department not listed. Other departments were listed with their relocation date and destination. The General Counsel argues from this that, by December, 2000, a decision had been made, probably by Lowry, that the FSA would be removed from MoMA QNS and relocated to Hamlin, notwithstanding that the Board of Trustees had voted to increase the budget and, in effect, save the space allocated to the FSA at MoMA QNS. Therefore, according to the General Counsel, the Museum had decided to take this action for reasons unrelated to any space or budgetary consideration.

Michael Cinquina testified that on January 31, 2001, at an all-staff meeting, he asked Lowry why the FSA was absent from the December, 2000 Draft Relocation Plan. Lowry replied

that Bandy was "pondering the future" of the FSA, and looking for off-site locations, adding that there was no room for it at MoMA QNS, and that there would be "security problems" in its operation there.

Lowry testified that in answer to the question, he said that he was not certain where the FSA would be located because other "pressures" had begun to develop concerning finding appropriate space for a "number of functions" at MoMA QNS, and that he had become aware that the FSA might not be able to be accommodated there. Lowry added that everything was in a "state of flux," and he could not assert that it would be located at MoMA QNS, adding that everything was under consideration. He also stated that he had become "increasingly convinced" that it was going to be "extremely difficult to accommodate everything that everyone wanted, including the FSA." Lowry also may have said that Bandy was looking for an alternate location for the FSA. Davidson agreed with Lowry's testimony that he was not definite as to whether the FSA would be located at MoMA QNS.

Corliss was informed of Lowry's January 31 statement, and informed Davidson in an e-mail that she was told that Lowry mentioned at the meeting that "the location for the Spring 2002 move of the [FSA] would not be in the MoMA QNS building, but rather in an off-site location unknown at this time." Corliss asked for an explanation as to the "future plans" for the FSA. Davidson replied: "Your information was correct; it is not clear where Film Stills will be located once this building is closed for renovation."

Bandy testified that, as of January 31, she had thought about Hamlin as a possible location for the FSA, but did not recall if she discussed her thoughts with anyone. She denied that she was "actively" looking for alternative sites at that time.

On February 15, Geesken wrote to human resources director Olon (Oz) Zager, asking about the future of the FSA. Her letter stated that Lowry said, on January 31, that there was no space for the FSA at the MoMA QNS building, and that Bandy was looking for another location. Geesken's letter closed by asking whether a new location had been found, and what happened to the space that was designated for the FSA at MoMA QNS. Geesken did not get a written reply, but testified that a few days later, Zager told her that there was a lot of "jockeying for position for space in the MoMA QNS building, and that we had been jockeyed out of our space." Geesken asked him who had received the FSA space at MoMA QNS, and Zager did not reply. Geesken's testimony was uncontradicted.

The evidence set forth above demonstrates clearly that as of January 31, Lowry had decided that the FSA would not be located at MoMA QNS. First, I credit Cinquina's testimony that Lowry said on that date that there was no room for it at that location. Lowry's testimony that he had become "increasingly convinced" that it would be extremely difficult to accommodate the FSA there strongly suggests that a firm decision was made by then. Davidson's e-mail to Corliss that her information was correct, in reply to Corliss being told that the FSA would not be at MoMA QNS, supports such a finding. Finally, Geesken's letter only two weeks after the all-staff meeting quoted Lowry as saying that there was no space for the FSA at MoMA QNS. This was met by Zager's response to Geesken that the FSA had

been “jockeyed out” of its space. Accordingly, Lowry’s January 31 comment that the FSA would not be at MoMA QNS is consistent with the December, 2000 Draft Relocation Plan which did not list any plans for relocation of the FSA to MoMA QNS.

The evidence further suggests, as set forth below, a finding that there was no business justification for Lowry’s statement on January 31 that there was no room for the FSA at MoMA QNS. The space allocated for the FSA was ultimately replaced by a projects room for the unframing project, space for Visitor Services staff, and a curators study area.

Lowry testified that Bandy had been “urging us as we were going through the exercise throughout late 2000 and even into 2001 as to what to do to find space in MoMA QNS to accommodate the functions that were going to be necessary as a result of the exhibition program; and therefore, displacing other functions to try and keep the FSA at MoMA QNS. And I ultimately decided that we needed that space for other more pressing matters” which was dealing with the exhibition program that was added to the building. However, Bandy testified that in early January, 2001, she believed that the MoMA QNS mezzanine had been retained and the FSA would be installed there.

Bandy stated that in 1999, when the plans for MoMA QNS were first modified to provide for exhibition space, the space needs for the Visitor Services Department were underestimated in that its managerial and supervisory staff were at first deemed to be unnecessary at MoMA QNS. Later, from January through March, 2001, when the FSA was still included in MoMA QNS, it was believed necessary to have those staff at MoMA QNS. Additional space was also needed for an employees’ lounge, Acousti-Guide equipment, cashiers’ area, and storage space for floor mats, signs and stanchions. In addition, according to Bandy, the original plans did not take into consideration the unframing project. That project involved removing the frames from drawings at MoMA QNS and storing them there until they were returned to the renovated museum where they would be stored in an unframed state. The unframing project was expected to take about two years to complete, and was planned to take place in a projects workroom on the mezzanine in proximity to the drawings and paper conservations areas.

The General Counsel argues that all these needs were either already accommodated, could easily have been accommodated without the removal of the FSA, or were not necessary. In support of his theory, architect Newman testified that as of January 10, 2000, the plan for MoMA QNS included an Acousti-Guide office, and storage for brochures, stanchions, mats and wheelchairs, items which Bandy stated required additional, unplanned for space in 2001.

The General Counsel further argues that the unframing project and the additional Visitor Services personnel could have been accommodated without the removal of the FSA – by changing the FSA file cabinet layout used to store the collection more than half the floor space in the collection storage room would have been available for the unframing project, while the Visitor Services personnel could have been housed in the space designated as a “work area” for the FSA.

On February 23, 2001, Cinquina e-mailed Zager with a request for an update on Bandy’s “search for sites to relocate the

Film Stills Department.” He made follow-up requests for such information, but apparently received no response from Zager.

An architectural drawing dated March 7, 2001, showed the FSA as still occupying its planned space on the mezzanine at MoMA QNS. This would tend to show that a final decision had not yet been made to remove the FSA from MoMA QNS. However, Newman testified that all that this shows is that the architects had not yet been told by the Museum that the FSA would be removed from the mezzanine.

Newman’s implication is borne out by what occurred next. Corliss testified that only five days later, on March 12, Stephen Weinstein, the Museum’s move-scheduler, mentioned that a decision had been made concerning the location for the FSA, but that he was “not at liberty” to disclose its location. Corliss e-mailed Bandy, with a copy to Davidson, advising them of this new information, and asking for a response. Bandy, who had just begun the actual move of her department from the Museum, replied that she would meet with Davidson as soon as she completed the current moves. Corliss inquired whether Bandy knew the new location of the FSA. Bandy answered on March 14, “when I know, you’ll know. I will ask Karen [Davidson] to meet with us asap, next week, to review. I am making every effort to review every location for every area of our department, and to adapt as we go along to the beat of the project. This is what we have done with shipping and the study center.” Corliss apologized for the “panic,” saying that, obviously she was “misinformed that the FSA space had already been determined.”

Bandy testified that plans for MoMA QNS were in a “constant state of flux,” and that between March 14 and April 30, she wanted the FSA to remain at MoMA QNS, and asked Lowry in mid April about that possibility. He did not believe that the FSA could remain on the mezzanine at MoMA QNS. Bandy was disappointed with the news. Bandy also asked him whether space could be rented in Manhattan for the FSA, but was refused by Lowry who said that the Museum could not incur any additional storage costs. It should be noted that up until that point MoMA had leased 12 locations for its collections in the amount of nearly \$1 million per year, and it had been decided that the Museum would reduce its leased holdings thereafter and not incur any new rental costs.

On April 30, 2001, Lowry sent an e-mail to Bandy in which he stated that “we have spent the last couple of months reviewing space allocations at MoMA QNS and I want to now confirm that we are unable to accommodate Film Stills there. I know you have already begun thinking about alternative locations and I must say the more I think about it the more sense it makes to me to take advantage of the space that we have at [Hamlin] for this material. . . .” Lowry testified that by April 30, he had decided that the FSA should be relocated to Hamlin.

The important question thus becomes what caused Lowry to announce to the staff on January 31, 2001, and tell Bandy on April 30 that the FSA would not be located at MoMA QNS. The General Counsel argues that his decision was motivated by the strike activities of Corliss, including the Museum’s settlement of the strike on terms favorable to the Union five months earlier. The Respondent argues that business decisions justified the relocation of the FSA, including the need for space for the

unframing project and Visitor Services staff in that portion of the mezzanine previously allocated to the FSA.

Newman testified that a need for an unframing project was identified in 1998, and the paper conservator recommended that project in late 1999 or early 2000.⁷ In late Spring, 2000, he received a proposal from the paper conservator. In late 2000 or early 2001 he was asked to seriously consider trying to accommodate that project, and his search for space for that project continued into 2001. Jennifer Russell, the Museum's building project coordinator with Davidson, asked Newman to look for space for the project in the Drawings Department, because a contiguous workspace for the drawings and their unframing would better protect the drawings from damage.

Newman stated that he looked at other areas for the project but found them unsatisfactory. At first, he did not consider the space allocated for the FSA for such a use because that space was too large for the project, and if he took only some of the FSA space, the collection would be separate from the staff area which would not be workable. In determining whether certain areas would be suitable for the unframing project Newman "communicated . . . and tested out those ideas with museum staff." In doing so, he obtained the opinions of the departments which would be impacted by the inclusion of the project in their space.

During Newman's search for a place for the unframing project, other space needs came to his attention. The first was the Visitor Services Department staff space. Newman stated that in March or April, 2001, Davidson and Diana Simpson, a supervisor in the Visitor Services staff, told him that Visitor Services needed more space. The Museum left it to Newman to identify and recommend space for these additional needs and he then made proposals for the Museum's review. He considered whether the first floor would be suitable for such space, but rejected it. He identified the FSA area as a possible space for Visitor Services staff because the Visitor Services' space needs were more closely related to the space that was to be occupied by the FSA, and the location of that space made it amenable to the placement of the Visitor Services staff. Davidson testified that Newman told her that the mezzanine was the best space to locate the Visitor Services staff. Similarly, the FSA space for the unframing project would be proximate to the drawings collection from which the framed drawings would come, and into which they would be returned. During his consideration of that space, Newman did not tell Bandy that the FSA may be eliminated from the mezzanine so that other uses may be made of that area. Likewise, during the time that he attempted to identify space that might be put to these other uses, he kept such information "internally" within the architectural firm. "Until we felt that we had a viable proposal, it didn't come out."

Newman also stated that in about March, 2001, when he searched for space for the unframing project and the Visitor Services staff area, he was advised by Milan Hughston, the head of MoMA's library and archives, that he wanted a curators study area at the MoMA QNS facility because the library in the Factory, the other building in Long Island City to which various

departments were relocated, was too small to accommodate curatorial staff research. Hughston asked Newman for a study area, and thereafter Newman told Davidson that a new need had been identified.

Newman testified that, in considering the FSA space at MoMA QNS for these other uses, he was aware that if the FSA would not be placed at MoMA QNS, the Hamlin Preservation Center could be used to receive the collection.

Finally, in about late April, 2001, Newman proposed to Davidson and Russell that he had other uses for the space allocated for the FSA at MoMA QNS. Between that meeting and July, 2001, the FSA space was removed from MoMA QNS and in its place space for Visitor Services staff, a projects room for drawings and the unframing project, and a curatorial study area were allocated there. Newman testified that after determining that the FSA would not remain at MoMA QNS, he did not search for any places at MoMA QNS in which the FSA could be placed since there was no other available space.

Newman stated that while deliberating the use of the FSA space for other purposes, and prior to making his late April, 2001 proposal, he did not discuss with any Museum personnel the utilization of the FSA space for other purposes. Following the presentation of the proposal, which he was asked to implement by Davidson and Russell, Newman then spoke to the Visitor Services Department to find out specifically what their needs were so that the space could be laid out, and then the drawings were done.

The General Counsel argues that inasmuch as Newman testified that, prior to late April, 2001, he did not raise the possibility of using the FSA for some other purpose with anyone in Museum management, coupled with Museum's witnesses' admissions that it was not until March or April, 2001, that anyone in Museum management had any reason to believe that the mezzanine at MoMA QNS which had been designated for the FSA would be used for any other purpose, therefore, no one in Museum management had any reason to believe, in December, 2000 and January, 2001, that the FSA might not or would not have space available for it at MoMA QNS.

Accordingly, the General Counsel argues that Lowry's testimony that the Museum had been aware in January, 2001 through March, 2001 that the space allocated to the FSA on the mezzanine at MoMA QNS might be needed for other uses was false. Lowry testified that in late 2000 into 2001, Bandy spoke to him about the need to find space at MoMA QNS to accommodate the functions which were necessary due to the addition of the exhibition program, but at the same time keeping the FSA there. The General Counsel argues that Lowry's testimony is in conflict with Newman's, who said that he did not raise the possibility of using the FSA space on the mezzanine for other purposes until late April, 2001. The General Counsel also argues that Lowry's testimony is at odds with Bandy's, who stated that she believed, as of early January, 2001, that the FSA space had been retained.

Bandy testified that Davidson told her in early Spring, 2001 that the FSA space was being "actively considered" for other purposes, and that sketches involving a "redesign" of the mezzanine to accommodate other uses for the FSA space were planned.

⁷ On January 3, 2000, a memo suggesting an unframing project was sent from the Drawings Department to Jennifer Russell.

The evidence supports a finding that Lowry's April 30, 2001 e-mail to Bandy announcing a decision that the FSA would not be located at MoMA QNS was prompted by Newman's independent search and discovery of space at that location to accommodate other uses. Thus, I credit Newman's testimony that he first considered the FSA's space for the unframing project, then rejected it as being too large, but then, as additional uses such as for the Visitor Services staff and curatorial study area were identified, he settled on the FSA space as the logical place for all those uses. I also credit Newman's testimony that during his examination of areas in which to place these services, he did not mention to Museum personnel that he was considering the use of the FSA area. Finally, his presentation of a proposal to the Museum in late April coincides with Lowry's message to Bandy that the FSA could not be accommodated at MoMA QNS.

I reject the General Counsel's argument that the FSA could have been accommodated at MoMA QNS by the placement of its cabinets in a different manner and moving the Visitor Services staff to a different place. These matters were apparently considered by the Museum's architect, who attempted to retain the FSA at MoMA QNS.

Although I find that the April 30 decision to remove the FSA from MoMA QNS was not unlawful and was based on a legitimate business decision, the earlier, January 31, 2001 announcement by Lowry that it would not be located at MoMA QNS is more troubling and suspicious. As set forth above, Lowry's announcement at the January 31 all staff meeting came three months before Newman proposed that the FSA's space be used for other purposes. Although Lowry may not have known specifically that the FSA space would be removed, it is apparent that he was apprised in January that there were space issues at MoMA QNS. Thus, Davidson testified that at the time of the January 31 meeting, Newman was "still working through trying to find space for all the support activities for the exhibition, and that he'd been receiving calls and e-mails directly. I'd received some e-mails about space needs, and so I knew we were . . . stretched for finding enough space to support the exhibitions." She stated that Newman communicated these general needs to Lowry at a building project meeting, and she may have done the same. It is true, as testified by Newman, that in late 2000 and early 2001 he was searching for space for the unframing project and at that time considered the FSA space for that project, but according to his testimony he did not share his belief that the FSA space might be utilized for those areas with Museum staff.

Accordingly, I find that although Lowry may have been apprised that Newman was engaged in a search for space at MoMA QNS for the unframing project as of January, 2001, he could not have been aware at that time that Newman would ultimately decide, in late April, that the FSA's space had been designated for that purpose. This is particularly so since Newman first considered and rejected that space, and then only in March, when he became aware that the Visitor Services staff and the curatorial work areas also needed space, he concluded that the FSA space must be relinquished. I thus find that Lowry had no factual or legitimate basis in announcing on January 31 that there was no room at MoMA QNS for the FSA.

2. The relocation of the FSA to Hamlin

Bandy was on leave from the Museum at the time Lowry's April 30 e-mail was sent, and did not see it until her return on about May 20. She gleaned from the e-mail only that the FSA would not be going to MoMA QNS. She did not believe, at the time, that Lowry had decided that the FSA would go to Hamlin. She stated that when she received the e-mail she did not suggest to Corliss or Geesken that if they reduced the scope of the FSA collection the FSA might be able to remain at MoMA QNS.

Bandy stated that, as of March 14, she had not identified any possible locations for FSA other than Hamlin. Lowry told Bandy that Hamlin was an alternative location for the FSA which she should take "very seriously" because it was owned and operated by MoMA and its placement there would incur no additional storage costs. Bandy and Lowry spoke about the feasibility of the FSA operating in Hamlin. She told him that she would try to "figure out how to make it work," but that operating the FSA in Hamlin would result in additional costs. Lowry advised her that it could operate there if it could be operated without incurring any additional costs.⁸ Bandy stated that in May or June, she asked Lowry if she could rent space in New York in order to operate the FSA, but he rejected the idea since the Museum intended to terminate all leases it had.

Bandy stated that she made the decision in late June or in July, 2001, that the FSA would move to Hamlin. This contrasts with Lowry's testimony that by the time of his April 30 e-mail *he* had decided that the FSA would be sent to Hamlin. Bandy stated that from mid April to July 12, 2001, she had not identified any possible locations for the FSA other than Hamlin, and had thought, in a general sense, about how the FSA could operate there. She also did not consider, until July, the costs involved in having staff operate the FSA there. She conceded that between mid April and October, 2001, she did not discuss with Corliss the possible operation of the FSA in Hamlin.

Corliss testified that on July 12, 2001, she met with Bandy and Davidson, at which time Bandy announced that the FSA would be moving to the conference room in Hamlin, essentially because of "space considerations"—the Visitor Services department needs space—and because of the Museum's interest in preservation of the collection. Corliss testified that she said that she "suspected" that the FSA would move to Hamlin, and in fact, Geesken was considering moving there. Bandy asked whether Corliss also intended to move, and was told that she would move to "wherever the job is," and looked forward to working in the conference room, but would like to work a couple of days per week in Manhattan. Corliss added that it would be very difficult for the FSA's clients to have access to it in Hamlin, and Bandy replied that when she returned from vacation after Labor Day, they would discuss that aspect. Corliss asked Bandy if she could inform the users of the FSA about the move to Hamlin. Bandy said that there was no need to do so at that time, and that everything would be held in abeyance until after she returned. Corliss testified that she agreed with Bandy that relocating the FSA to Hamlin would "severely discourage"

⁸ Bandy stated that at a March or April budget committee meeting, she was told that no additional expenses could be incurred in the operation of the Film and Media Department.

its regular clients based in New York from using the archive through personal visits.

Corliss raised the issue of the purchase or lease of a car to commute to Hamlin, and Bandy replied that inasmuch as she believed that such costs would be borne by the Museum, she understood that no additional costs could be incurred by the Museum for those purposes.

Bandy testified that by the time of the July 12 meeting, she had not thought through the operation of the FSA at Hamlin. She believed that its operation in Hamlin was “uncertain”—because of the distance from the Museum there would be less usage, it would cost more money to operate there, there was very limited public access to the facility, and there were other sources for the same kinds of material in the New York City area. Bandy conceded that at the July 12 meeting Corliss asked how the FSA would operate in Hamlin. Bandy said that films were shipped daily from Hamlin, and that any materials could be sent the same way. She told Corliss that there was sufficient space in the conference room for the storage of the collection, and believed that the staff lounge could be used by the FSA staff as office space. Corliss testified that at the meeting, she asked how the FSA would operate in Hamlin, and Bandy said that she had not thought that matter through and was not prepared to answer such questions, but said that they would discuss it later in the year, since she believed that the FSA would remain at 53rd Street for one more year.

On November 13, Corliss met with Bandy and Steve Higgins, Hamlin’s film archive curator.⁹ They discussed the possible operation of the FSA in Hamlin. Higgins said there may be problems with its operation since Hamlin was not designed for public access. Bandy asked Corliss to write a report on how the FSA is operated at the Museum and how it could function in Hamlin. Corliss gave the report to Bandy on November 16. It outlined the space and equipment needs for the archive’s operation in Hamlin, and stressed that due to the distance from Manhattan, the FSA would probably lose its media client base. According to Bandy, the report reinforced her view that it would not be practical to operate the FSA in Hamlin since many clients would not visit the archive, and there would be problems in transportation and communication between personnel and the users and materials. Further, in November and December, Bandy received letters from many users of the FSA, in which they mentioned that because of the distance to Hamlin, they would not use its services there. At the same time, each curatorial department had been asked to curtail its non-essential activities, and she did not believe that it was essential to operate the FSA at that time.

On December 10, Corliss, Bandy, Higgins, and Natalie Hirniak, the manager of the Film and Media Department, traveled to Hamlin. They decided that the conference room would not be suitable for the placement of the collection since it had many windows and was not climate controlled. It was believed that the cabinets containing the collection could be placed in the hallways and corridors outside the vault area. Corliss testified that she discussed using the conference room as an office and work space for the FSA staff. Corliss stated that neither

Bandy nor the Hamlin staff spoke to her regarding how the FSA would operate, and those discussions were “deferred.” Corliss found a “lack of enthusiasm” from the Hamlin staff for the operation of the FSA there. Corliss at first believed that Bandy and Higgins were “moving forward” with the idea of FSA becoming operational at Hamlin, and even noted that Bandy pointed out that she and Geesken could work in the conference room. Bandy denied telling her that. But later, Corliss came to the conclusion, based on the lack of discussion during the return trip from Hamlin, that Bandy and Higgins were not in favor of operating the FSA in Hamlin. Indeed, Bandy testified that she did not recall discussing how the FSA might operate there, and was “vague” regarding whether it would be open in Hamlin.

3. The closure of the FSA and the layoffs of Corliss and Geesken

Shortly after her return from Hamlin, Bandy spoke twice with human resources director Zager regarding the possible operation of the FSA in Hamlin. By the second meeting, after December 25, Bandy had concluded that the FSA would not operate in Hamlin since it was not practical to operate it so far away without supervision. She reasoned that neither Higgins nor she would be able to supervise the daily activities of Corliss or Geesken at Hamlin, particularly since the manager of Hamlin, Artie Weirhans, had his “hands full” handling the regular work of the Film Preservation Center. Bandy conceded that Corliss and Geesken were capable of operating the FSA in Hamlin, but that doing so required managerial supervision regarding issues of security, access, and shipping. She noted that at 53rd Street, Corliss and Geesken were not responsible for access to and from the Museum, the collection or delivery of mail, or the operation of the building. She conceded not knowing how many FSA users would require access to Hamlin, a highly secured facility, and how much of a burden such access would cause the security staff there. Bandy also expressed the belief that shipping of FSA materials from Hamlin to Manhattan and other locations would have been an added expense for the Film and Media Department. Nevertheless she did not believe that shipping charges were a major factor compared with the costs of housing and transportation at a time when she was aware that no additional expenses could be incurred for the operation of the Film and Media Department.

Zager testified that, in the December meeting, Bandy told him that she was “struggling” with whether to keep the FSA open in Hamlin. She told him that she always wanted to keep it open, but now did not know whether she would be able to do so. She told Zager that following her visit to Hamlin, she believed that many additional expenses would have to be incurred, and that she believed that she would have to close it. About one to two weeks later, Bandy told him that although she was not happy with her decision, she had concluded that she must close the FSA and lay off its staff during the Museum’s renovation. Her reasons included the difficulty of users traveling to Hamlin, and expenses such as transportation in operating it there given the “severe budget constraints” she was operating under. In that regard, Bandy testified that she cut the budget of her department, reduced certain activities, did not replace staff

⁹ The film archive is a separate department from the FSA.

who left, closed one of the theaters the department was using, and reduced the public program.

On December 27, Union representative Cinquina requested a meeting to discuss the relocation of the FSA. A meeting was arranged for January 9, 2002. Zager, upon advice from counsel, decided that inasmuch as the Union wanted to discuss the move of the FSA, he and Bandy must tell the Union that the FSA would be closed and Corliss and Geesken would be laid off. Although the layoff of Corliss and Geesken was to have taken place upon the move of the FSA one month later in February, Zager testified that as a result of the Union's request for the meeting, he decided to lay off the two employees earlier than they otherwise would have been.

At the January 9 meeting, Zager told Cinquina that the FSA would be closed and Corliss and Geesken laid off. Cinquina asked about other positions for them, and Zager replied that Corliss was not qualified to do anything else at her grade level, and management had not looked at any other positions at a lower grade level. Similarly, management had not thought of looking at other positions for Geesken. At hearing, Zager testified that, although he did not discuss with Bandy whether there were other positions available for Corliss and Geesken, he believed that their skills had been exclusively in one very specific area, and he did not pursue the concept that the skills that they had were transferable to other areas of the Museum. Nor did he believe that either was qualified to perform any other position at the Museum. Bandy stated that she did not consider any other possible positions for Corliss or Geesken at the Museum. Theirs were the only layoffs of unit employees in the Film and Media Department.

Immediately after that meeting, Zager and Bandy met with Corliss and Geesken, and told them that the FSA would be put in "cold storage" in Hamlin and they would be laid off. Corliss replied that she did not understand the reasons for the layoff. Bandy answered that this was her decision, and that at this time, preservation is more important than research materials or exhibition, and that Hamlin had always been designed for preservation. Bandy believed that, inasmuch as the primary mission of the Museum during construction was the placement of the collection in a safe, secure environment, such mission was accomplished in sending the FSA to Hamlin. Bandy testified that she also told Corliss and Geesken that she did not see how an operational program would work in Hamlin. Corliss answered that if the reason is preservation, why are you laying off the two people needed to maintain the collection? Bandy replied that those duties would be hers and Higgins's. Corliss offered to stay at work until the collection was moved in order to help in Hamlin getting the FSA put in place. Zager said they would consider that, but two days later, on January 11, they were told to leave that day. Bandy noted that it was her prerogative to bring the collection back at any time, even before the renovation was completed. The FSA was moved to Hamlin on about February 22.

Bandy decided that the FSA would not operate in Hamlin because (a) she believed that fewer users would use the FSA since it was located 100 miles and a two-hour commute from Manhattan (b) Corliss and Geesken would be unsupervised during their operation of the FSA and (c) the Museum budget

would not permit the increased costs of housing and transportation by the staff of the FSA. Bandy learned in March or April, 2001 that there was no additional funding available in her department's budget for the operation of the FSA. The General Counsel notes that Bandy gave no opportunity to Corliss or Geesken to address her concerns, or to overcome her reasons for deciding that the FSA could not operate in Hamlin. Rather, she simply laid them off.

The General Counsel asserts that Bandy found none of above reasons objectionable when she discussed the possible operation of the FSA in Hamlin with Lowry in March or April, 2001, and therefore questions what changed her mind in mid December, 2001 following her visit to Hamlin. In March or April, 2001, as set forth above, Bandy told Lowry that if there was a way to operate the FSA in Hamlin, she would find a way. I credit Bandy's testimony that, following the December visit she became convinced that it could not operate in Hamlin. However, I cannot agree that the lack of supervision was a valid reason for concluding that the FSA could not operate in Hamlin. In New York, Bandy exercised little, if any, supervision of the FSA staff, and had little contact with it. It operated, according to Bandy, "independently" and she agreed with that.

James Frasher, the personal manager of the late actress Lillian Gish, and a friend of both Bandy and Corliss who used the FSA, testified that following the close of the FSA, he had lunch with Bandy, at which she blurted out without a question being asked, "I'm sorry about Mary Corliss and Terry Geesken, but I had nothing to do with it. It was the museum." Bandy denied that remark. Her version of her remarks was that she expressed her regret that they had been laid off because she knew that he was a good friend of theirs.

In early February, 2002, an article appeared in the *New York Observer*, generally criticizing the Museum's decision to close the FSA and lay off Corliss and Geesken. It also criticized the Film and Media department and its leadership, specifically Bandy. It quoted Corliss as criticizing Bandy's appointment in 1980. In response, Bandy wrote to Lowry, stating that her staff believed that the department was "erroneously described" and asking him to call two current staff members in effect to offer his support for the department. Lowry replied, suggesting a letter from the department supporting Bandy and "perhaps indicating their lack of respect for [Corliss] may make the strongest case." Bandy replied that she was not in favor of that approach.

On February 8, Higgins sent an e-mail to Lowry regarding the Film and Media Department and the layoffs of Corliss and Geesken:

Internally, the problem is different. The closing of the Film Stills Archive and Mary and Terry's layoffs happened swiftly, and with no word from the administration. I understand that this sequence of events was precipitated by the union itself, but the total silence from above has, indeed, created an atmosphere of unease and suspicion toward the administration, and not only within [the Union]. My evidence is, obviously, only anecdotal and scattered, but it certainly appears to many that the museum is trying to hide something by not making some sort of announcement. I certainly know that this isn't the case, but perceptions outrun facts when one doesn't have ac-

cess to the facts. As I said yesterday, the closing of Offset merited more notice from the museum, and Mary's was a curatorial position. It may well be that the time has already passed for a statement, but this situation has made it clear to me that when the only source of information concerning such an action comes from the aggrieved parties, through a sympathetic press, the effect on staff is pronounced.

This message from Higgins, the Museum's film archive curator, underscores the secrecy surrounding the layoffs of Corliss and Geesken. This stands in stark contrast to Lowry's assertion that with respect to layoffs caused by the renovation, he "would have tried to assure staff that they were not going to wake up in the morning and get a pink slip. But rather, that we would try to have to the degree that we could as deliberative a process as possible." However, long-term employees Corliss and Geesken were not involved in any deliberative process, and in fact their layoff was scheduled to be announced upon the move of the FSA to Hamlin. It was only when the Union pressed for information concerning the effect of the move on the two employees was it revealed that they would be laid off.

On July 12, 2002, a press release by the Museum stated:

To accommodate its building project, The Museum of Modern Art in early 2002 moved its film stills archive to The Celeste Bartos Center. This move to the Museum's film preservation center in Hamlin, Pennsylvania, temporarily restricted access to the collection.

It has always been the Museum's aim to restore public access to the archive, a world-renowned collection of over four million stills. Limited access to the archive is available to film scholars who are not able to locate specific stills in other archives.

All queries will be dealt with on a case-by-case basis.

It should be noted that Corliss testified that in 1999, during a tour of the Swingline facility, Lowry told the assembled curators that they should use the "down-time" period of the renovation to work on maintaining their collections. Corliss estimated that it would take several years to examine and integrate into the collection the 70 to 100 boxes of uncatalogued and unfiled materials which had been received over the years.

4. Alleged animus

The General Counsel's witnesses testified to Lowry's attitude toward the strike on the picket line, giving examples of him acting as if leading an orchestra to the pickets' chants, beckoning them to shout louder, and bowing to the inflated rat on the last day of the picketing. Lowry denied all such theatrics. Even assuming that Lowry engaged in such behavior he was simply responding and reacting, in his own way, to the loud picketing and the increased chanting when he entered or left the Museum. Such a performance, if it did occur, cannot establish animus where it does not exist.

Corliss maintained that Bandy had less frequent contacts with her following the strike, and had difficulty having calls returned. However, they were always civilized, cordial and friendly, and worked together, when necessary, in a professional, businesslike manner. Bandy gave her permission to

attend the Toronto Film Festival as a juror for 10 days in 2001 on Museum time for which she was paid her salary, but not expenses. Bandy also permitted her to collaborate with an author on a book about film. Bandy was not required to agree to those requests. Corliss also asserted that Lowry was cold to her following the strike, and would not respond to her greeting. Lowry denied doing so. Geesken also described a similar change in attitude which was denied by Lowry.

On September 29, 2000, about three weeks after the end of the strike, John Johnson, an employee in the Film and Media Department, sent an e-mail to Bandy, referring to their meeting the day before. Johnson wrote that he Bandy "reproached" him, "if not personally, then by association—for the events of the strike and your stated perception that those of us on strike in the Film Department were betraying, if not you, then the Department itself." Johnson also wrote that Bandy said that the strikers were "hurting the Department," and further told him that "things were not going to be the same from now on," mentioning that he had been spending too much time on the sixth floor, he was being watched, and that working hours were from 9:30 to 5:30 with one hour for lunch, and that she hoped he would be courteous to the non-strikers. Johnson also quoted Bandy as saying that "some scars would never heal but that [Bandy] wished to clear the air and move on." Bandy replied, saying only that she did not believe that she used the word "betrayal, nor did I say that you were being watched."¹⁰ Bandy testified that she told Johnson that the strike had been hard on the staff in that there were "very strong feelings" in the department on both sides of the matter. Her reference to things not being the same referred only to her desire that Johnson adhere to the established working hours of the Museum. Johnson continued to work in the department until his death in July, 2002. He was a friend of Corliss and Geesken, who were beneficiaries of his estate.

As set forth above, Lowry testified that he did not resent the staff for striking, or hold it against anyone after the strike, because they had a right to do so. Museum attorney Clark testified that Lowry announced at staff meetings attended by all employees during the strike that the strikers are their friends and colleagues, and they must work with them after the strike.

As evidence of its lack of union animus, the Respondent notes, and it was stipulated, that following the conclusion of the strike, 34 of the 120 employees who remained on strike for its entire duration were promoted to higher positions. Twelve of those 34 employees were no longer employed by the Museum at the time of the hearing. Further, 37 of the 104 employees who either did not strike or returned to work before the end of the strike have been promoted. Ten of those 37 employees were no longer employed by the Museum at the time of the hearing. It was further stipulated that since July 1, 2001, the Museum laid off 19 employees represented by the Union. Of those 19 employees, 9 engaged in the strike and 10 did not engage in the strike. Of those 19 employees, four were employed in curatorial

¹⁰ Johnson gave a pre-trial affidavit in April, 2002 to a Board agent. He died before the hearing opened. Although I received the affidavit in evidence, it does not contain substantive matters beyond the e-mail message, above.

departments, and only one, Corliss, held the position of associate curator.

5. The book buying department and Michael Cinquina

a. Cinquina's union activities

Cinquina began his employment with the Museum in 1988 as the assistant to the book buyer, and was promoted to assistant book buyer in 1996. Cinquina was extremely active in the Union, his first position being the secretary treasurer in 1989. In 1992, he was elected steward and secretary-treasurer of the Program Committee, a group of seven stewards who conduct the Union's business. He was a member of the negotiating committee in 1993, and was the chair of the negotiating committee in 1996 and 1999. He was elected the unit chair in 1997, and held that position until 1999, when he was elected as a trustee of the Union and had to give up the unit chair position. At the time of his termination in 2002, Cinquina was a trustee of the Union, a steward of the Program Committee, the chair of the grievance committee, and the chair of the negotiating committee.

It is undisputed that the Museum was aware of Cinquina's position on the Program Committee in that he attended department head meetings in such position, and he was present at the negotiation sessions in 1999 and 2000. He had extensive involvement with Zager, the director of human resources, who called him "absolutely aggressive" in carrying out his Union responsibilities, and observed that he was in charge of, and "very vocal" on the picket line.

Cinquina did not work in the Museum building on 53rd Street, however his duties included periodic visits to the bookstore, where he picked up mail, delivered materials and checked inventory. During the most recent contract negotiations in November, 1999, Zager suggested to Cinquina's supervisor Richard Dobbs, that a new mail delivery system be implemented so that Cinquina would be kept out of the bookstore—"with negotiations heating up, we don't need more excuses for Michael to be in the . . . 53rd Street building." Respondent's officials, including Director of Operations Joe Meany told Dobbs that Cinquina engaged bookstore employees in discussions about the Union during work hours. The General Counsel argues that this is evidence of the Respondent's animus toward Cinquina.

Museum attorney Stephen Clark did not recall Cinquina asking him for a room at the Museum where the Union could conduct a strike authorization vote, and also could not recall telling him that he would hold him to the letter of the law regarding the contract as Cinquina testified. He stated that his relationship with Cinquina was cordial before and after the strike.

Cinquina was extensively involved in the 2000 strike. He was present at the picket line each day of the strike, spoke through a bullhorn, established and dismantled the picket line each day, inflated and deflated the large rat in front of the Museum, was interviewed by the media, and spoke at rallies in front of the Museum, and at the City Planning Commission hearing on September 6. He also shouted "shame on you Mary Lea" to Bandy. Dobbs also described a conversation with Zager during the strike concerning Cinquina, in which Zager said "oh well, here's your buddy out here stirring up trouble again. Can't you do something about that?"

Cinquina testified that in about late May, 2000, he confronted Lowry on the picket line as he walked by, accusing him of misrepresenting to his staff, certain off-the-record negotiations, and asserting that his intention is to "bust" the Union. Lowry did not reply, however a couple of days later, Lowry handed him a letter which stated, inter alia, that they both agreed that the strike should end, and that Cinquina and his negotiating team should contact the mediators and advise them that the Union's position has changed on the major outstanding issues. Lowry noted that he has insisted to his staff that the Union has the right to strike and everyone respects that right, but that Cinquina should show "similar tolerance and understanding" by focusing on the Museum's proposal, rather than shouting at working staff members.

Cinquina further stated that thereafter, Lowry approached him on the picket line and said that the strike would not end until the Union gives up on union security, and signs a waiver on health care. Two months later, in late July, an alleged anti-semitic statement was made to Ronald Lauder, a Museum trustee, by a picket who stood near Cinquina. Lowry, who was present, accused Cinquina orally and in writing of making the comment, and demanded that an apology be made to Lauder.¹¹ Cinquina denied making the comment, and demanded that Lowry apologize to him for defaming him.

Cinquina also testified at the City Planning Commission hearing on September 6. His point was that since the City had given the Museum at least \$65 million toward the building project for the ostensible purpose of promoting educational initiatives, it was ironic that most of the education department was on strike. He noted that the City should not permit the Museum to continue the project when it refused to settle its labor dispute.

Cinquina stated that his relationship with Lowry was "cordial in a very superficial way," conceding that they had infrequent, hallway contact, but following the strike Lowry would not return his greeting.

Following the strike, Cinquina filed about 20 grievances, 40% of which were taken to arbitration. Museum counsel Batterman stated that there had been an "avalanche" of grievances following the strike, and more demands for arbitration, whereas before the strike there were very few. Cinquina claimed that the Museum was not processing the grievances expeditiously, wanting more information about the facts of the grievance. At a meeting with Zager and Clark, Cinquina told them that they must establish a "foundation of trust." Clark replied that it was hard to trust the union when "you are filing so many frivolous grievances." Joe Hannan, the chair of the Program Committee, corroborated that Clark made that comment. Hannan, who was also active in the strike, stated that after the strike ended, Clark asked him to become involved with a grievance filed by Cinquina in behalf of a striker. Clark proposed a resolution of the grievance, and Hannan asked why he wanted to meet with him and not Cinquina. Clark replied that he believed that Hannan was a "rational" person, unlike Cinquina whose Union advocacy had become "fanatical" and "off the deep end."

¹¹ Lauder did not know who made the statement.

Clark testified that Cinquina was a “little fanatical” on the picket line, but not in his day-to-day dealings with him, although in those instances he was “not reasonable,” as compared to Hannan. Clark denied referring to the grievances as “frivolous,” but did tell the Union at a meeting that the grievance at hand was “hard to take seriously” when the Union refused to give the Museum any facts concerning it.

Dobbs testified that in late September, 2000, after the strike ended, he spoke with Ruth Shapiro, the director of merchandising and his supervisor, concerning the direction of the book department. Shapiro said that she supported the mission of the department as envisioned by Dobbs, and was happy with its performance, but that “we were also going to have to be very careful in our dealings with Michael going forward because the Museum was going to be paying very close attention to any interaction with Michael in the future.” Shapiro denied making such comments.

Cinquina was not threatened with reprisals because of his participation in the strike, and no management official mentioned his strike activities following his return to work.

b. Cinquina's work duties

Cinquina was the assistant book buyer in a two-person department comprised of himself and the book buyer, Norman Laurila. Prior to Laurila's arrival in July, 2001, the book department consisted of book buyer Adam Bunney. Richard Dobbs was the merchandise manager for books. When Bunney and Dobbs left the Museum, in about December, 2000, Cinquina operated the book-buying department alone for about seven to eight months until Laurila's hire.

There are two main operations in book ordering, the front list, and the back list. The front list consists of those books which have never been carried by the Museum. The back list consists of those books which have been ordered and sold, for which there is a sales history.

Cinquina's main responsibility, which comprised about 55% of his workday, consisted of ordering the back list titles using the Lawson computer book ordering system.¹² He ordered about 1000 titles per month. Twenty per cent of his day involved inventory, and the movement of inventory; the special order program, in which customers request a specific title, comprised 10% of his day; and ordering for the Museum's exhibitions and shows was 10%. Cinquina worked on returns to vendors for 5% of his day, and he also negotiated prices with small vendors. Laurila disputed this last duty, saying that he, and not Cinquina decided which books to return to vendors. In making such a decision, he generated an excess inventory report, and consulted with Cinquina and the bookstore managers, and Cinquina prepared a negative purchase order based on the list given to him by Laurila.

Cinquina created orders for the back list based upon his review of the daily sales reports. He generated daily sales reports for each of the three locations at which books were sold. Laurila testified that Cinquina ordered the back list titles on his

own, subject to Laurila's buying criteria. Cinquina testified that the only buying criterion given by Laurila was that if a book was selling less than four or five copies per month, he should not continue to order it. However, Cinquina used that criterion only as a starting point. He stated that he would then look at each title individually. Cinquina considered the following factors in ordering books from the back list. Using the sales history of the books, he considered how the book has sold in the past, including whether it is popular only on a seasonal basis; he analyzed the prior sales pattern; and he considered the current exhibitions at other New York City museums and current newspaper reviews of an exhibit or a performance. In addition, curators of exhibits at the Museum may request books, and members of the public may order books. Shapiro stated that 80% to 90% of back list ordering is determined by the sales history, and that factors subjectively considered by Cinquina such as the plans for the future in terms of anticipated demand, will an upcoming holiday affect sales, exhibition attendance, requests by curators, books available only at MoMA, cannot be considered by any software program.

Dobbs, Cinquina and Laurila all agreed that Lawson was not a good system in that it was not designed for retail book operations. Cinquina said that it was not effective in ordering books with the software that was used. It also did not address certain problems, such as “phantom stock,” where the computer states that a certain number of books are on hand, but the actual numbers are fewer, either because of theft, misfiling, or the book is in another store. Cinquina said that he had advocated for a better system for years, and had been told by book buyers before Laurila that such systems would work better.

Dobbs wanted Cinquina to spend more time in the bookstore working on the phantom stock issue and making customer contact. However, Museum management did not want Cinquina in the bookstore any more than necessary, and particularly objected to his engaging the bookstore staff in conversations concerning the Union on work time.

Laurila conceded that it was part of Cinquina's responsibility to check the accuracy of the inventory due to theft, misfiling, and the books being in the wrong place, but such was also the duty of the bookstore staff. Laurila received numerous calls from the bookstore staff questioning quantities of books in the store. Cinquina disputed Laurila's testimony that phantom stock is discovered through the sales staff. He stated that, in a three-month cycle, he reviews every book in the bookstore, including its month-by-month sales reports. In making such reviews, he notes that, for example, there are a certain number of copies of a book on hand, but that there had been no sales and therefore discovers the problem. Laurila, on the other hand, stated that the bookstore staff, which was in the best position to check the inventory, could discover those issues.

Laurila began work in July, 2001. He reports to Ruth Shapiro, the director of merchandising and acting director of MoMA retail. About one year after his hire, the 53rd Street Museum and its bookstore were closed during the renovation.

The General Counsel asserts that Laurila's hire presented the opportunity for the Museum to discharge Cinquina. He argues that within one month after his hire, Laurila had determined,

¹² Ninety per cent of the book ordering he does is back list ordering. Sixty eight per cent of the book ordering was for the main Museum bookstore on 53rd Street; 20% for the SOHO store, and 10% for the Design Store.

with the approval of management, to implement a computer software program which would supplant Cinquina's job.

Laurila testified that during his job interview, he was told that his duties included making sure that the bookstore was closed in an orderly way, supervise the books to be placed in the Design Store in SOHO that was scheduled to open in September, 2001, plan for books to be sold at MoMA QNS, and plan for the reopening of the bookstore on 53rd Street. Zager testified that he participated with Shapiro in the interviews of Laurila. Zager stated that Laurila's familiarity with bookstore computer software contributed to his hire, as did his current ideas concerning the running of a book operation. Laurila stated that during the interviews, there was no discussion regarding updating the computer programs, or his plans for the book buying staff. Shapiro testified that Laurila was hired because of his understanding of the book business and art book buying, and because she believed that he could manage the business more profitably and in a "different way" than had been done in the past. She also described "endless inventory control problems." She denied discussing inventory systems with Laurila, but did speak with him about inventory management. Shapiro conceded that she was told by Laurila "very early on—perhaps even in the interviewing process" that a system existed which could "significantly streamline what were very labor-intensive systems that we were currently employing." Shapiro expected Laurila to evaluate how the book buying business was operating at that time, and recommend ways to improve it.

Laurila testified that upon his hire, he met with Cinquina to determine the nature of his duties. He did not specifically instruct Cinquina as to what to do. They did not have a formal meeting, but they spent five to thirty minutes each day speaking about work that had to be done. Cinquina's job duties remained the same from Laurila's hire until he was laid off. Cinquina did not discuss with Laurila what his job duties entailed. According to Cinquina, he first discussed his work with Laurila when Cinquina went on vacation in November, 2001. He had little interaction with Laurila—they worked two floors apart—occurring only when, twice daily, Cinquina picked up mail or reports from Laurila, or Laurila gave him some papers. He stated that Laurila never questioned any decision he made with respect to any aspect of his work.

In about September or October, 2001, Laurila became increasingly aware of the shortcomings of the Lawson book ordering system, notwithstanding that he referred to Lawson as the "bible," which is still being used and constantly updated and downloaded each day.

c. The consideration of books-in-store (BIS)

Shapiro testified that in the past the Museum had attempted to modify Lawson to fit the Museum's needs, but ultimately found that it did not serve the functions needed. Shapiro stated that she was aware of Dobbs' dissatisfaction with Lawson, and was aware that he wanted to make that system accommodate the Museum's needs. She agreed with Dobbs, but told him that she did not want to adapt a system that was not intended for the Museum's type of business, and in any event he did not make a specific proposal as to how Lawson might be adapted. Thus, no additional changes in Lawson were pursued until Laurila intro-

duced a software program named Books-in-Store (BIS), which could solve many of these problems.

Laurila spoke with Ray Martinelli, the Museum's director of finance and retail operations, and Michael Maegraith, the head of the Museum's publications department regarding BIS. Laurila had extensive experience with BIS, which he used for 22 years as the owner of three or four small bookstores.¹³ Laurila said that he wanted to research the available software.

Laurila researched a number of programs, but BIS stood out, basically because he was most familiar with it, it was not too expensive, and presented a "possible short term solution" to be used at least through the close of the bookstore.¹⁴ He envisioned BIS as helping him analyze and manipulate sales data so that ordering would be based on sales history, thereby eliminating some of the "guess work" involved in such ordering.

Shapiro testified that Laurila told her, in late September, 2001, that the tedious and labor-intensive book ordering procedure could be significantly expedited by using BIS, which could be implemented easily and could interface with Lawson. She told Laurila to investigate the utility of the system with the Information Technology Department.

Laurila met with Maegraith and Martinelli and Bob Rocco, from the Museum's Information Technology department. They were not familiar with BIS, but agreed to see if it was worth their time to implement a system which would interface with Lawson. About one month later, Rocco told Laurila that it was feasible to use BIS, but with "many caveats."

Shapiro testified that in late 2001, she was informed by the Information Technology department that BIS could be implemented with some changes to the system without a great financial commitment. At that time there was no discussion concerning whether the implementation of BIS would result in the loss of any positions. Shapiro stated that in December, 2001 and January, 2002, Laurila believed that it would be possible to go forward with BIS, and in January, 2002, the Information Technology Department said that it could implement it.

Shapiro testified that ultimately BIS was acquired because it was "promoted very vigorously" by Laurila, who mentioned, in the Fall of 2001, that he had worked with that system for many years, and he believed it would be appropriate and inexpensive. She stated that it was implemented essentially because it was inexpensive, it required a minimum amount of work for the Information Technology department, and the scope of the book buying business was so reduced due to the upcoming closing of the Museum, that the risk of implementing it was minimal.

Laurila testified that between February, 2002 and June, 2002, BIS was implemented in stages. First, it was used to create an original database, then it became able to talk to Lawson, with Lawson telling BIS what was sold, and finally it became able to make electronic orders.

¹³ According to Laurila, BIS is used by 500 to 800 small to medium sized bookstores in the U.S.

¹⁴ BIS monthly costs are \$150 for the software, \$120 of which is paid towards its purchase, and \$40 for maintenance. It also costs \$600 per year to subscribe for "pop up" books. Its installation was done by the Museum's Information Technology staff.

Zager testified that he first became aware of BIS in January, 2002, in that Laurila wanted to buy software that would make the book-buying department more efficient. Zager stated that he was not involved in the implementation of BIS, and did not give his approval for such implementation. James Gara, the chief operating officer of the Museum and responsible for its retail function, testified that he involved Zager in BIS in 2002 because he knew that he had a background in retail operations, and Gara had just become responsible for that department. Zager's e-mail of January 22 supports that Gara, and not Zager, approved the project and its implementation.

Zager stated that on about April 1, 2002, Gara told him that Laurila was making progress on BIS, and he believed that there was a possibility that BIS might lead to a reduction in staff, namely Cinquina. Gara noted, however, that BIS was still in a "pilot stage" and he just wanted to give him advance notice. Zager said that he had not realized that BIS would result in a reduction in staff, and that "further discussions" would have to be held since Cinquina was a long service employee and held a responsible position in the Union. Zager's reason for mentioning this was so that Gara would review all the "implications" of a reduction in staff.

Shapiro stated that in mid to late April, 2002, Laurila told her that he expected BIS to operate as he expected, and that he believed that it would eliminate many of Cinquina's responsibilities, particularly in view of the closing of the bookstore, and in fact he was not certain that Cinquina's job would "exist." Laurila outlined his reasons: the reordering of front list and back list books would be reduced from what had been done previously; special orders would not be continued; and Cinquina's reconciling inaccuracies between invoicing and shipments and movement of inventory between the warehouse and store would be drastically curtailed due to the close of the bookstore. In about July, 2001, the bookstore carried 10,000 titles. Following the close of the bookstore, there were a total of 2500 titles in the back list of all the stores. Shapiro said that she was under "great pressure" at that time to reduce expenses and personnel.

Laurila stated that before BIS, Cinquina did back list ordering each day through the use of a large number of reports which showed how many copies were sold the day before, how many copies were on hand at the bookstore and at the warehouse, and how many were currently on order. He selected the books for such buying. Next, Cinquina generated a purchase order, which had to be approved by Laurila, but was not electronically transmitted to the vendor, but rather was sent by mail, fax or phone.

According to Laurila, BIS determines which and how many books to order. Lawson did not perform that function, and because the orders are transmitted electronically, there are fewer errors in shipments. Cinquina spent about 25 to 30 hours per week doing back list ordering, including following up on such orders, and correcting problems related to such orders. With BIS, the majority of back list ordering consumes only one hour or less per week, and it does not involve a review of daily sales reports.

Laurila testified that Lawson did not have the ability to place electronic orders to vendors, or to prepare purchase orders for

books based on the books' sales history. He stated that, with BIS, it takes about one to two hours per week to prepare a back list order, the same work that Cinquina testified took him six hours per day to perform. Laurila sets criteria, for example, that he wants to maintain a one week or a 10 week supply of a specific book. BIS will then produce a suggested purchase order, which he reviews and then uses other information to decide whether to agree with its suggestion.

Such other information includes his knowledge that a book sold 100 copies this week because the author was at the Museum, but fewer will be sold the following week; a book will sell well because it is seasonal, for Christmas, but on January 1 it will not sell; and he knows that an exhibition is opening at another museum, or that a book has just been reviewed in the newspaper. Thus, Laurila modifies the order by adding or reducing the number of books ordered based upon his personal, "subjective, intuitive" knowledge. Of course, this is the same subjective information that Cinquina used.

Upon his approval, the purchase order becomes final and he sends it electronically to the vendor. The vendor immediately confirms what books it has and how many it will send. When the confirmation is received, and fewer books will be sent than ordered, BIS asks the user if he wants to separate the titles that the vendor will not send, and create a second purchase order to send to a second vendor selected by the user. This "cascading order" system facilitates speedy and more accurate ordering. Previously, with Lawson, if a vendor did not have the book requested on the purchase order, the user did not become aware of that when he placed the order unless he made a telephone order, asking how many books the vendor had. Otherwise, the user did not know how many books he would get, or if back ordered, when the new shipment would arrive. This uncertainty with Lawson made it much more difficult for the book department to manage its inventory—it would not know whether a title it ordered would ever arrive.

Laurila attributes the saving of time with BIS to his ability to give the computer the criteria needed to suggest an order based on the sales history of the book. It provides a "wealth of information" including a database of nearly 2 million books. The user need only enter four fields of information instead of the 20 done previously with Lawson.

Regarding orders for exhibitions, the curators advise Laurila as to which books they want to be on sale with the exhibition, he then researched the list to determine which books are available, and then gives Cinquina the list with the quantity Laurila decided to order. Cinquina prepared the purchase order and sends it to the vendor.

Cinquina also decided which books should be removed from the back list, which meant that it would not be reordered, based on the criteria Laurila gave him. Occasionally, Cinquina asked him what number of books should be ordered, but Laurila stated that in the course of his work, Cinquina used his discretion and independent judgment in determining the back list books to be ordered, separate from the criteria Laurila established.

As to the front list which Laurila ordered, Cinquina entered in the records a new vendor when one was used, he created an individual sku for each title ordered, and generated a purchase

order in which he entered 20 fields of information for each book ordered. With BIS, Laurila enters the ISBN book number and four other numbers, and the rest of the fields are automatically entered.

In late April or early May, Shapiro met with Gara and Ray Martinelli regarding Laurila's comments about Cinquina's job. They did not discuss his activities as a Union representative. She stated that, based on what Laurila told her, she did not believe that Cinquina's position was needed particularly in light of the continued pressure to reduce expenses and lay off employees. They discussed the fact that Cinquina was a long-term employee, and they considered that he had great experience, but that Laurila was developing expertise and familiarity with the business. They also considered that Cinquina was a Union representative, and that the layoff "would not be received well," however his Union activities were not a factor in the decision to lay him off. Gara asked if the book business could be managed with only one person. Shapiro had further discussions with Laurila and Martinelli and she recommended to Gara that Cinquina's position be eliminated.

In May, 2002, Laurila was told that the Information Technology department was confident that BIS would work properly without interfering with Lawson. That department took about four to five months on a part-time basis to implement and test BIS. At the same time it was planning all the new systems for the relocation to MoMA QNS which was to open in July, 2002.

In May, 2002, Laurila spoke for the first time with Gara regarding BIS, who asked for a report on what BIS could do and how it would interface with Lawson. Zager also spoke with Gara at about that time, who told him that Laurila tested BIS and believed that it could do the "bulk" of Cinquina's job. Zager again advised him that he should consider the proposed layoff of Cinquina carefully since he believed that there would be "ramifications" from the Union. Gara replied that he took those aspects into consideration.

Laurila also spoke with Shapiro in that month, and told her that he had determined, based on how BIS was working with Lawson, that there was no longer enough work for the position of assistant book buyer. His conclusion was based on the use of BIS with Lawson to do the back list ordering, the clerical aspect of the front list ordering that Cinquina performed, together with the closing of the bookstore and the fact that the Museum would be carrying fewer titles thereafter. He believed that BIS would supplant a majority or a significant part of Cinquina's job.

Laurila testified that no one suggested to him that BIS would cause Cinquina's job to be superfluous. Laurila deemed it his obligation to keep the assistant book buyer busy, but when he realized that there would not be enough work, he believed that he had a duty to inform Shapiro that Cinquina's job would no longer be needed. Laurila stated that not even a part time job would be sustainable among Cinquina's remaining duties, particularly with the close of the bookstore and the changes brought about by BIS. Laurila stated that, even if the bookstore had not closed, he would have made the same recommendation concerning the absence of work for Cinquina. Cinquina stated that with Laurila's arrival in July, 2001, his department was geared toward the close of the bookstore one year later, but

nevertheless, the bookstores had daily sales targets to reach, and he worked on that aspect, in other words, ordering the books so that they would be sold.

Shapiro testified that she asked for details as to why BIS made Cinquina's position unnecessary. Laurila explained that BIS uses daily sales levels history and current inventory to predict, based on parameters it is given, what quantity of books should be ordered. The parameters, which the person inputs, includes the number of copies the Museum wants to keep in stock for the next three weeks or two months, etc. BIS then suggests the number of copies that should be ordered, and generates a purchase order. Laurila also explained that BIS would eliminate the majority of time spent in reordering the back lists, and would facilitate the ordering and entering of front lists. Laurila did the front lists, but Cinquina did some clerical aspects of front list ordering which Laurila now did. Shapiro asked Laurila pointedly if he was certain that BIS could do the majority of the work that the position of the assistant book buyer had been doing. Laurila replied that "it is possible." He did not recommend that Cinquina be laid off, and did not offer any alternatives to his layoff. Neither Martinelli, Gara nor Zager asked him whether there was sufficient work to employ Cinquina on a part time basis.

Thereafter, Zager met with Gara and Shapiro. They agreed that BIS was accomplishing everything Laurila said it could, and that Laurila and Gara determined that BIS replaced the bulk of Cinquina's job. They then discussed the effect of the closing of the bookstore, and when Cinquina should be told that he would be laid off. They considered offering bookstore employees transfer to MoMA's other bookstores which would remain open during the renovation. Cinquina was not offered a transfer, however, because he was not employed in the bookstore. Zager believed that Cinquina was a "book specialist," and that given his "very narrow background," no other appropriate position existed for him in MoMA. Zager stated, however, that they considered whether the Museum could "create" a part-time position for Cinquina, but decided that there was not enough work to justify such a position, and that the work that remained could be shifted to other unit employees. Shapiro stated that she was not aware of any other position in the Museum that was available and that she knew that the retail department was trying to reduce its staffing levels wherever possible. There were no other jobs available in the retail department, and the Museum was laying off employees in the stores.

Shapiro stated that Cinquina spent much of his time attempting to reconcile inventory levels of books, invoices and purchase orders for books that did not match. She believed that ordering through BIS would be more accurate and therefore avoid many of these problems in the future. She further stated that missing inventory was not the root of the inventory problems.

Shapiro stated that Cinquina's layoff was based on the following factors: his job duties were drastically reduced or eliminated by BIS, the Museum sought to save money and reduce expenses in every way it could, and the upcoming close of the bookstore.

Gara reviewed the recommendations made to him by Shapiro, and Martinelli, and made the ultimate decision to lay

off Cinquina. He stated that the reasons for the layoff included (a) the finances of the retail department were poor (b) Cinquina's position was "not required" because of the implementation of BIS and (c) the Museum was closing in early June, and it would be losing its most profitable source of revenue, the bookstore.

In mid to late May, 2002, Shapiro and Zager decided to lay off Cinquina at a time proximate to the close of the bookstore. At the same time, Laurila was told that a decision was made to lay off Cinquina based on his assessment that BIS could perform the tasks he said it could do, and that there would not be sufficient work for an assistant book buyer.

Laurila did not tell Cinquina that BIS was being considered for use in the department, and also did not tell him that his position was at risk of being eliminated due to BIS. Cinquina first heard about BIS when he was laid off. Laurila testified that he did not advise Cinquina of BIS notwithstanding his 14 years experience in the book buying department, because Cinquina was not knowledgeable as to BIS, and because, first, he did not know whether it would be implemented, and then when it became clear that it would be implemented, he did not consider whether it would affect Cinquina's employment.

The General Counsel argues that the alleged secrecy surrounding the consideration of BIS, and its implementation were part of the Respondent's plan, initiated with the hiring of Laurila, to discharge Cinquina. The General Counsel further argues that BIS was suggested and implemented in secret so that Cinquina would not question its implementation or its impact on his job. In January, 2002, Zager urged that BIS be implemented "as quickly as is feasible." Zager testified that since he believed that BIS would be more efficient, he wanted it in place as soon as possible. He also labeled his e-mails in January and May, 2002 regarding BIS as "confidential," thanking those he wrote for their "discretion," and asking them to "keep it low key." However, Zager testified that there was nothing confidential about the implementation of the BIS program. Gara denied telling Zager that BIS was a confidential project, but did urge that it be finished so that it would not "linger" into the opening of MoMA QNS. Laurila stated that initially, from September, 2001 to early 2002, there seemed to be no urgency to implement BIS. However, the project became somewhat more urgent because the Information Technology department was "getting tired" of working on it.

Dobbs testified that, at the time of the hearing, with the bookstore closed and only 25% of the titles being sold, with fewer people visiting the Museum, with electronic ordering through BIS being operated by Laurila, only one individual in the book buying department, Laurila, is appropriate.

d. Cinquina's layoff

On June 5, 2002, Cinquina learned that he was being discharged. On that day he met with Zager and Ruth Shapiro. Zager told him that the Museum decided to computerize the back list ordering, and since the bookstore was being closed, it would be carrying a reduced number of titles. Accordingly, the administrative work in the department was being "severely reduced" and he was no longer needed. Cinquina replied that administrative work was eliminated from his job in 1996 when

he was promoted to assistant book buyer, but that now he makes subjective decisions in ordering books. Shapiro then said that the department had problems with money and space which resulted in his layoff. Cinquina answered that he was only making about \$33,000, and he had no dedicated office space, but rather occupied space below the stairway.

Although it did not have to, the Museum treated Cinquina's layoff as being building-related, thereby permitting him certain recall opportunities, which he would not otherwise be entitled to. John Harris, whose layoff was also not building related, was also offered the same building-related recall options. Cinquina's layoff letter, stated, in part, that "the computerization of the book reorder and return to vendor functions has dramatically reduced the volume of administrative work required of the Book Buying Office." He was further advised that "there is at least a significant possibility, if not a probability, that your position will not exist at the time the Museum reopens. The duties of your current position may be eliminated, combined with other duties for which you may or may not be qualified or, it may be recreated as a part-time position. We do not envision a full-time position limited to the duties you have been performing."

It is expected that the reopened bookstore at the Museum will be substantially smaller than the old bookstore, both in titles carried and in space. Maloney, the project director, estimated that the space for retail sales in the renovated museum will consist of only 60% of the space it formerly had, and books in the new bookstore will occupy only one-third of its previous space.

III. ANALYSIS AND DISCUSSION

A. Corliss and Geesken

1. The layoffs

The evidence establishes, as set forth above, that the ULURP proceedings were of major concern to the Respondent. It was essential that the Museum receive the variances and approvals it applied for in order to successfully conclude its ambitious, expensive renovation and expansion project on 53rd Street.

It is also clear that the ULURP process was threatened by the continuation of the strike, as Lowry himself acknowledged to the Museum's trustees' executive committee, and as established through the credited testimony regarding Museum official McDonald's statements to Hammond and Hannan. Although Lowry continued to object to the connection between the two matters, the tie between them was obvious. I find that part of the reason that he believed that the strike could interfere with the ULURP proceeding was the intervention of New York City Council member Quinn, and her determination to oppose the applications until the strike was settled. The evidence supports a finding that the strike was settled in response to the Manhattan Borough Board vote rejecting the Museum's applications. Although that vote was nonbinding, Lowry was concerned enough about the vote that he made presentations before that Board on two consecutive days.

Only five days after the vote, a secret contract negotiation session was held at which a tentative new agreement was made. The timing of the session, which was held at the urging of Mu-

seum counsel Batterman, was clearly in response to the vote. As set forth above, I do not accept Batterman's testimony that the time was simply ripe for agreement. The strike had been in progress for 4-1/2 months, there was no diminution in the number of the strikers, no indication that the Union had been weakened by the strike as he testified, and the Union had not dropped its demand for an agency shop clause, also as he testified. On the other hand, Museum events had been cancelled due to the strike, the daily picketing took its toll on attendance, and according to Lowry the strike "was not a good thing." Ultimately the Respondent agreed to the agency shop clause originally proposed by the Union, and the Union agreed to waive its right to strike after bargaining on changes to the Museum's health benefits.

The evidence supports a finding that the Respondent was motivated to accept the terms of a new agreement, including the agency shop clause which it opposed for decades and publicly opposed during the strike, in order to ensure the removal of political objections to its ULURP applications, and to assure the approval of its applications. Under these circumstances, it therefore follows, and I find that the Respondent bore animus toward the Union for its attempt to delay or defeat its extensive renovation plans.

I further find that the Respondent bore animus toward Corliss who spoke at the City Planning Commission hearing urging rejection of the Museum's applications, and was the subject of several print media articles critical of the Museum. She spoke in support of the strike, and before the City Planning Commission she made a connection between the Museum's applications and its bargaining, accusing it of negotiating in bad faith, and poorly paying its employees. Although her City Planning Commission remarks took place after the tentative contract agreement was reached, nevertheless I believe that she was viewed as someone who also publicly opposed the Museum's applications and threatened that project. Her actions were protected and concerted. *Triangle Electric Co.*, 335 NLRB 1037, 1038-1039 (2001); *St. Luke's Episcopal-Presbyterian Hospitals*, 331 NLRB 761, 762 (2000).

As set forth above, the evidence establishes that when Lowry announced on January 31, 2001 that there was no room at MoMA QNS for the FSA, his comment was not based upon any legitimate business justification. At that time, no plans had been developed, proposed or adopted which would eliminate the FSA from the mezzanine at MoMA QNS. The architect's proposal was not made for another three months, in late April, 2001, to eliminate the FSA. I accordingly find that Lowry's announcement of January 31 was a pretext—"the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982).

I find that thereafter, however, the Respondent lawfully decided to remove the FSA from the mezzanine at MoMA QNS, and then lawfully relocate it to Hamlin, and then close it and lay off Corliss and Geesken.

Thus, architect Newman conducted an independent and thorough search at MoMA QNS for space for the unframing pro-

ject, Visitor Services staff and a curatorial work room. It is not contended that Newman's study was prompted or manipulated by the Museum in an effort to eliminate the FSA from the facility. Indeed, the evidence is to the contrary. Newman did not consult with any Museum personnel concerning the need to use the FSA space for such purposes. The General Counsel alleges only that the Museum seized on Newman's conclusion to support Lowry's January announcement.

I accordingly find that the Respondent, through Newman, made an independent search for space for additional, unexpected uses that came to his attention, and properly proposed that the space, formerly allocated to the FSA, be utilized for these added services. Although no charge was filed concerning the removal of the FSA from MoMA QNS, I find that, even assuming the General Counsel has made a *prima facie* showing that the January 31 announcement of the elimination of the FSA from MoMA QNS was motivated by the Union's strike and Corliss' activities in behalf of the strike, the Museum met its burden of proving that on April 30 it eliminated the FSA even in the absence of those activities. *Wright Line*, 251 NLRB 1083 (1980). The Museum's acceptance of Newman's proposal was based on proper business reasons which justified the adjustment in space.

Thereafter, the Museum decided to send the FSA to Hamlin, Pennsylvania, and then to close it and lay off its staff. The General Counsel argues that those decisions were the product of the Respondent's secret, but ongoing purpose to eventually lay off Corliss and Geesken.

The evidence is to the contrary. Following their return to work Corliss and Geesken continued their normal work routines without incident until their layoffs 16 months later. They were not the subject of any statements of displeasure at their striking or Corliss' testimony at the City Planning Commission hearing. They were not subject to any recriminations or discrimination until their layoff. In fact, Corliss continued to interact with Bandy in a businesslike, professional way. Indeed, following the end of the strike, Bandy gave her permission to attend the Toronto Film Festival as a juror for 10 days on Museum time for which she was paid her salary. It may be true, as the General Counsel contends, that serving as a juror may benefit the Museum as well as Corliss, but nevertheless Bandy could have denied permission for that activity if she was intent on punishing her for her strike activities. Bandy also permitted her to collaborate with an author on a book about film.

The evidence permits a fair inference that Bandy, as the head of the Film and Media Department, had a strong interest in keeping the department together, sought to have it remain whole, and urged that it remain at the FSA, and was disappointed that it could not do so. She also sought to rent space in Manhattan so that it would not be sent to Hamlin, but was denied permission to do so under across-the-board restrictions on leasing space and incurring further expenses during the renovation. Further, the evidence supports a finding that Bandy engaged in a good faith effort to consider the operation of the FSA at Hamlin. In doing so, she requested and obtained a report from Corliss as to the FSA's current operations, and how it could be expected to operate in Hamlin.

In addition, Bandy traveled to Hamlin with Corliss with the purpose of finding suitable space for the collection there, and in a good faith attempt to consider its operation at that location. I am convinced that if Bandy had already decided to close the FSA and lay off its staff, she would not have involved Corliss or traveled to Hamlin. Following her return from Hamlin, Bandy continued to give careful consideration to the operation of the FSA there. However, she legitimately concluded that it could not operate at Hamlin. The trip to Hamlin convinced her that it was not practical to do so.

Assuming I find that the General Counsel has made a prima facie showing that the closure of the FSA and the layoffs of Corliss and Geesken were motivated by unlawful considerations, I find that the Museum's decision to close the FSA and lay off its staff were the result of proper business considerations. Bandy's decision was based on the distance between Hamlin and the main users of the FSA, a factor supported by the users themselves who said that they would not patronize the FSA if it was located in Hamlin, the added cost of housing and transportation which would be borne by the Museum, and the lack of supervision. Although I find this last reason somewhat implausible since Corliss and Geesken were subject to little supervision on 53rd Street, nevertheless there is a difference between them being on a separate floor at the Museum and 100 miles away in Hamlin. These decisions were hers, and not Lowry's. Frasher's remark that Bandy told him she had nothing to do with the layoffs—that it “was the Museum” can be explained by Bandy's understandable desire to shift the responsibility for the layoffs because of her friendship with Frasher, who she knew was also a friend of Corliss and Geesken.

The General Counsel argues that Bandy's reasons for not operating the FSA in Hamlin were known to her months before, and she kept her decision secret until the last moment, apparently to avoid a confrontation with the Union. This theory is somewhat supported by Museum official Higgins' e-mail, set forth above, in which he states that the “perception” although not the fact, is that the layoffs were suspicious because they were made quickly and in silence. I cannot, however, on this record, particularly in the absence of persuasive evidence of animus toward Corliss during the long period of time that she continued at work before her layoff, conclude that the Respondent has violated the Act in its layoffs of Corliss and Geesken.

In order to find a violation in the Respondent's decision to lay off Corliss and Geesken, I would have to find that a plan was devised and implemented from the end of the strike in September, 2000 to the layoffs 16 months later which involved personnel from Lowry on down. Those involved in such a conspiracy would include at least, architect Newman, Davidson and Bandy. The scheme would involve the hope that Newman would propose the removal of the FSA from MoMA QNS, then that it would be located distant enough to be unusable to its patrons, then that it would be found to be impractical to operate it, then to lay off its two staff members. On the contrary, it has not been contended that Newman made his proposal by the use of anything but lawful, neutral considerations. Although “there is no specified time lag between union activity and discharge that serves to immunize an employer from responsibility under the Act,” such “latent hostility” must be accompanied by a

“high degree of antiunion animus.” *Marcus Management*, 292 NLRB 251, 260, 263 (1989). Evidence of such animus is lacking here. I recognize that it is possible that Lowry conceived such a plan and implemented it, using the renovation of the Museum as a cover. However, this record does not support such a finding. The General Counsel bears the initial burden of proving by a preponderance of the evidence that antiunion animus was a motivating factor in the layoffs. “Mere suspicion cannot substitute for proof of unlawful motivation.” *Fierson Building Supply Co.*, 328 NLRB 1023, 1024 (1999). This record contains only suspicion and inferences of improper conduct from an alleged withholding of plans from Corliss, and an alleged change in attitude by Lowry toward her in their infrequent contacts. I similarly cannot infer any animus toward Corliss and Geesken from Bandy's remarks to Johnson, set forth above. Her comments related to Johnson's work hours, and although she claimed that the strikers hurt the department, she expressed a desire to clear the air and move on. Her working relationship with Corliss following the strike establishes that she did just that.

As proof of the Museum's improper motive, the General Counsel argues that the Museum refused to discuss the future of the FSA and refused to consider its continued operation. He argues that Bandy did not discuss the alleged budgetary constraints with Corliss and Geesken, or seek their advice as to how the FSA could operate within those alleged constraints, or how the FSA might operate in Hamlin. On the contrary, the evidence establishes that Bandy dealt with matters as they arose, given her numerous responsibilities in her department and with respect to the renovation. The fact that Corliss and Geesken were not advised of the move of the FSA from the time of Newman's proposal in late April can be explained based on the fact that the plans did not become final in July, the same time that Corliss and Geesken were in fact advised that the FSA would not be at MoMA QNS. In addition, as testified by Bandy, she still sought to keep the FSA in New York and asked Lowry, in May and June for permission to lease space there. Further, Bandy did consult with Corliss regarding the operation of the FSA at Hamlin, and she requested a report concerning Corliss' view of how it would operate there.

The General Counsel also faults the Respondent for not considering the possibility of closing the Film Study Center, and moving it to Hamlin rather than the FSA, citing the facts that the Film Study Center did not generate any revenue for the Museum, unlike the FSA. Further, that the Film Study Center served a smaller population than the FSA, and closed for part of each year. Moreover, according to the General Counsel, inasmuch as part of the Film Study Center was already at Hamlin, the remainder of it which was then at the Factory in Long Island City, could also be moved there, and the FSA replace it at in the Factory. The General Counsel also notes that the associate curator of the Film Study Center, Charles Silver, was opposed to, and did not strike, and received the only sabbatical leave granted during Lowry's tenure as Director. The sabbatical was for a period of six months, from April to October, 2002. Its purpose was a research project. It must be noted, however, that no one was hired at the Film Study Center to replace him, and the cost of the sabbatical was borne by department funds. Fur-

ther, the General Counsel notes that inasmuch as the Film Study Center staff worked in both the Factory and at Hamlin, the FSA could also be operated in that manner. However, Bandy said that the operation of the Film Study Center by staff in Hamlin was difficult, with the Museum paying for transportation and housing, and that had not been a satisfactory way of operating the Center. In addition, the Film Study Center had already moved to the Factory by the time the FSA was scheduled to move. It was in place there and operating there. It was therefore understandable, even if Bandy considered such a change, that she would want to avoid further disruption in her department.

The General Counsel further asserts that the March, 2001 hire of Helena Robinson to work in the Film and Media Department as a researcher is evidence of unlawful motive. The department had received a \$100,000 grant from Celeste Bartos for the purpose of research, and \$25,000 to \$30,000 of that amount was utilized as Robinson's salary. The General Counsel asserts that all or part of the grant could have been used to offset any additional expenses the FSA would incur in operating from Hamlin. It was Bandy's prerogative to use the grant money as she saw fit. She believed that such funds could not properly be used to operate department functions.

2. The acceleration of the layoffs

Although I cannot find that the decision to lay off Corliss and Geesken violated the Act, I find, however, that the Respondent unlawfully accelerated their layoffs because of union considerations and because the Union requested a meeting in order to discuss the relocation of the FSA.

Corliss and Geesken were not scheduled to be laid off until the move of the FSA on February 22, 2002. However, because the Union in January asked for a meeting to discuss the status of the FSA, Zager decided that, having already decided that the FSA would be closed, he must honestly inform the Union of that decision, and therefore was obligated to tell the employees immediately.

Accordingly, Zager told the Union that the FSA would be closed, and that Corliss and Geesken would be laid off. Instead of laying them off upon the close of the FSA which was the original plan, Zager decided to lay them off that week. Immediately following the meeting with the Union, Zager told them that they would be laid off, and that the layoff would occur that week. It does not matter that the Respondent acted because it believed that it had to give the Union all the information it possessed regarding the closure. The violation is that the Respondent accelerated the layoffs in response to the Union's request, and it would not have laid them off at that time but for that request. In fact, Zager admitted that "as a result of the Union's request for a meeting [he] decided to lay off Mary Corliss and Terry Geesken earlier than they otherwise might have been laid off."

Even assuming that it was Museum policy that once a layoff is announced the employees are not permitted to remain employed for any period of time because of staff morale or other reasons, nevertheless the precipitating reason for the acceleration of the layoffs was the Union's request for information. Thus, the Respondent's "primary defense, in and of itself [that

the Union prompted the accelerated layoffs] amounts to an unfair labor practice because the events setting it in motion were initially prompted by union considerations."

The Union's request for a meeting concerning the status of the FSA was the sole cause of the Respondent's decision to lay off Corliss and Geesken earlier than planned. Instead of being laid off on February 22, their layoffs were accelerated to January 11. It is an unfair labor practice for an employer to accelerate an already planned lawful layoff because of union considerations, or because the Union intervened in their behalf. See *Laben Electric Co.*, 323 NLRB 428, 432 (1997); *Yellow Freight System*, 290 NLRB 1090, 1094 (1990); *Hemisphere Broadcasting Corp.*, 290 NLRB 394, 395 (1988); *Ohio Valley Graphic Arts, Inc.*, 234 NLRB 493 (1978).

No charge has been filed alleging the unlawful acceleration of the layoffs. However, in *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2nd Cir. 1990), the Board held that it "may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." Here, a close connection clearly exists between the complaint allegation that the employees had been terminated, and the question whether the Respondent violated the Act by accelerating their termination. Further, as in *Pergament*, here the Respondent's official Zager admitted that he accelerated the layoffs of Corliss and Geesken because the Union asked about their status. The Board in *Pergament* based its finding that the issue had been fully and fairly litigated on an admission by a company official that he refused the rehiring of employees because charges had been filed. Accordingly, *Pergament* clearly compels a finding, which I make, that the Respondent unlawfully accelerated the layoffs of Corliss and Geesken from February 22, 2002 to January 11, 2002.

B. Michael Cinquina

Cinquina had extensive union activities, as outlined above. He was the person most identified with the picketing, testified at the City Planning Commission hearing, and had two confrontations with Lowry on the picket line. Nevertheless, he returned to work following the strike and continued to perform his duties for two years until his layoff without any adverse employment action or comments concerning the strike. He was aggressive in his representation of the unit employees, even being called "fanatical" by Museum attorney Clark, and he filed an "avalanche" of grievances. But even assuming those grievances were deemed "frivolous" by the Museum there is no evidence that it took any reprisals against him for engaging in such activities. The Respondent cannot be faulted for attempting to prevent him from speaking to unit members about the Union while they were working. Shapiro's comment to Dobbs that the Museum would pay close attention to any interaction with Cinquina was vague, and also occurred nearly two years before his layoff.

The credited testimony establishes that Laurila independently utilized his experience with BIS to attempt to improve a computer system which Cinquina and his prior supervisor, Dobbs, acknowledged, was lacking. Perhaps Lawson should have been modified before Laurila's hire, but the fact that it

was not does not alter Laurila's autonomous role in recommending BIS. There is no evidence that Laurila was prompted to find a software system which would ultimately cause Cinquina's layoff. He sought to improve a system that everyone recognized was flawed. The Museum set about in a systematic way to test the system, a process that took months. I can find no rush to implement the system as alleged by the General Counsel. Even if there was a desire to implement BIS quickly, that was done to coincide with the close of the bookstore, a lawful reason.

It is clear that BIS eliminated much of Cinquina's work in ordering back list titles. Although Cinquina considered certain subjective areas in "sculpting" the back list, which cannot be performed by a computer, nevertheless Laurila believed that given the amount of time saved by BIS in the routine ordering functions which was automated by BIS, he could perform those functions alone. In addition, Laurila, as the book buyer, lawfully determined that Cinquina need not undertake a physical inventory of the books in the bookstore, but rather, that task should be performed by the bookstore staff, which is primarily responsible for that responsibility.

Accordingly, the elimination of a major part of Cinquina's duties through the implementation of BIS, taken together with the close of the bookstore for the renovation project, led to the lawful decision to lay off Cinquina. Dobbs, the former book buyer and a witness who testified for the General Counsel, testified that given the circumstances as they existed at the time of Cinquina's lay off, only one person, Laurila, was necessary to operate the book buying department. The fact that the Museum's exercised caution because of Cinquina's prominence in the Union does not alter the fact that the decision to lay him off was based on lawful considerations.

I accordingly find that even assuming the General Counsel has made a prima facie showing that Cinquina's layoff was motivated by his union activities, I would find that the Respondent met its burden of proving that he would have been laid off even in the absence of such union activities. *Wright Line*, above.

CONCLUSION OF LAW

By accelerating the layoffs of Mary Corliss and Terry Geesken because of union considerations or because the Union requested a meeting to learn the status of the FSA, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the layoffs of Corliss and Geesken were unlawfully accelerated from February 22, 2002 to January 9, 2002 because the Union requested a meeting to learn the status of the FSA, I shall order that they be made whole for any loss of earnings and other benefits, from January 9, 2002 to February 22, 2002, less any net interim earnings, as prescribed in

F. W. Woolworth Co., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); *Hemisphere Broadcasting*, above.

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended¹⁵

ORDER

The Respondent, The Museum of Modern Art, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Accelerating an already planned lawful layoff of employees because of union considerations or because a union requests a meeting.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Mary Corliss and Terry Geesken whole for any loss of earnings and other benefits resulting from the acceleration of their layoffs from February 22, 2002 to January 9, 2002, in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful acceleration of the layoffs of Mary Corliss and Terry Geesken, and within 3 days thereafter notify the employees in writing that this has been done and that the acceleration of the layoffs will not be used against them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in New York, NY, copies of the attached notice marked "Appendix."¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and

¹⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 9, 2002.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(f) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 16, 2004

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT accelerate an already planned lawful layoff of employees because of union considerations or because a union requests a meeting.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make Mary Corliss and Terry Geesken whole for any loss of earnings and other benefits resulting from the acceleration of their layoffs from February 22, 2002 to January 9, 2002, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful acceleration of the layoffs of Mary Corliss and Terry Geesken, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the acceleration of the layoffs will not be used against them in any way.

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